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SELF-EXECUTION AND TREATY DUALITY

Pursuant to Article II of the Constitution, the President has the power to make treaties with the advice and consent of two-thirds of the Senate, and these treaties uncontroversially become binding on the United States as a matter of international law. The status of such treaties within the U.S. legal system is less clear. The Supremacy Clause states that, along with the Constitution and laws of the United States, treaties made by the United States are part of the “supreme Law of the Land.” At least since the Supreme Court’s 1829 decision in *Foster v Neilson*, however, it has been understood that treaty provisions are directly enforceable in U.S. courts only if they are “self-executing.”¹ The legitimacy and implications of this self-execution requirement have generated substantial controversy and confusion among both courts and commentators.

Much of the debate over self-execution has been fought out, at least in part, on originalist territory, with competing claims about what the constitutional Founders would have understood. Whatever one may think of the virtues of originalist methodology in general, it has not been successful in moving the self-execution debate forward. Among other things, both treaty practice and the nation’s

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¹ See 27 US (2 Pet) 253, 314–15 (1829).

position in the world have changed so dramatically since the Founding that is difficult for originalism to compel contemporary conclusions. It is noteworthy, for example, that most scholarship on self-execution hardly mentions the phenomenon of congressional-executive agreements (which are ratified by the President with the approval of a majority of both houses of Congress rather than two-thirds of the Senate), even though they constitute the vast majority of international agreements concluded by the United States since the 1930s.² Similarly, the development in the modern era of legislative-style multilateral treaties, many of which overlap substantially with domestic legislation, poses issues not contemplated by the Founders.³

The Supreme Court's decision last Term in *Medellín v Texas* contains the most extensive discussion of treaty self-execution in the Court's history.⁴ In that case, the Court held that a treaty obligation of the United States to comply with a decision of the International Court of Justice (the international adjudicatory arm of the United Nations that sits in The Hague) was not self-executing and thus could not be applied by U.S. courts to override an otherwise valid state rule of criminal procedure. The Court also held that the President lacked the unilateral authority to compel state courts to comply with the International Court's decision. The decision is both controversial and subject to differing interpretations and thus, if anything, is likely to intensify the debate.

My goal in this article is to clear up some conceptual confusion relating to the self-execution doctrine and, in the process, better explain the contemporary practice of the courts and political branches relating to treaty enforcement. To that end, I will make three claims about treaty self-execution. First, the Supremacy Clause does not by itself tell us the extent to which treaties should be judicially enforceable. Second, the relevant intent in discerning self-execution is the intent of the U.S. treaty-makers (that is, the President and Senate), not the collective intent of the various parties to the treaty. Third, even if treaties and statutes have an equivalent status in the U.S. legal system in the abstract, there are important

² See Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Law-making in the United States*, 117 Yale L J 1236 (2008).

³ See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich L Rev 390, 396–97 (1998).

⁴ See 128 S Ct 1346 (2008).

structural and functional differences between them that are relevant to judicial enforceability.

As will be shown, these three claims are interconnected. The central theme connecting them is that treaties have a dual nature, in that they operate both within the domain of international politics as well as within the domain of law. In addition to having a certain status within international law, and potentially also within domestic law, every treaty is a contract that implicates the U.S. relationship with one or more other nations, and such a relationship inherently includes political as well as legal elements, such as considerations of reciprocity, reputation, and national interest. This duality of treaties is in turn relevant, as I will explain, to their domestic judicial enforceability.⁵ The three claims set forth in this article are also complementary, in that each of them is best understood along with the other two, and together they present a relatively coherent explanation for the judicial precedent in the area, including (despite its ambiguities) the *Medellín* decision, as well as the practices of the political branches.

Part I of this article briefly reviews the academic debates over treaty self-execution, some of the uncertainties surrounding the issue, and what is at stake. Part II defends and explains the implications of my first claim: that the Supremacy Clause does not by itself tell us the extent to which treaties should be judicially enforceable. Part III defends the second claim: that the relevant intent concerning self-execution is that of the U.S. treaty-makers. Part IV defends the third claim: that, even if statutes and treaties have equivalent legal status in the abstract, they are different in important ways that relate to judicial enforceability. Finally, Part V explains how *Medellín*, despite its ambiguities, is generally consistent with these three claims.

In staking out these claims, I will refer extensively to the work of Professor Carlos Vázquez, who has been the most prolific and sophisticated theorist about treaty self-execution and who recently

⁵ There is a long-standing theoretical debate about how to conceive of the relationship between international law and domestic law, a debate that is sometimes framed as one between “monism” and “dualism.” The term “dualism” in that debate refers to the view “that international and domestic law are distinct, each nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law.” Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 *Stan L. Rev* 529, 530 (1999). My use of the term “duality” in this article is not intended to engage with that debate.

published an important article on the topic in the *Harvard Law Review*. Although my article will focus primarily on points of disagreement between us, I should emphasize at the outset that there are many points relating to treaty self-execution on which we agree, and I have benefited greatly from his work on the subject.

I. THE SELF-EXECUTION DEBATE

As Professor Vázquez has usefully explained, there are a number of possible reasons why a U.S. court might decline to enforce a treaty that has gone through the Article II process.⁶ A treaty may call for a governmental action, such as the appropriation of money or the creation of criminal liability, that is thought to lie exclusively within the powers of the full Congress. Some treaty cases, like some constitutional and statutory cases, may be nonjusticiable—for example, because of standing requirements or the political question doctrine. Or the case may depend upon the recognition of a private right of action, and the court may conclude that the treaty does not itself confer such a right of action. Finally, a court may conclude that a treaty was not intended to be judicially enforceable unless and until implemented by a political branch, usually Congress. The *Foster* decision relied on this last proposition, and Professor Vázquez refers to this doctrine as “*Foster*-type non-self-execution.”⁷ It is this type of non-self-execution that is the focus of this article.

Critics of *Foster*-type non-self-execution contend that it is at odds with, or at least in tension with, the Supremacy Clause, which states that “all” treaties made by the United States shall be the supreme law of the land. *Foster*-type non-self-execution, the argument goes, means that only *some* treaties are given effect as supreme law of the land.⁸ In part because they view *Foster*-type non-self-execution as difficult to reconcile with the Supremacy Clause, critics contend that there should at least be a strong presumption in favor of treaty

⁶ See Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am J Intl L 695 (1995).

⁷ See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv L Rev 599, 602 (2008).

⁸ See Vázquez, 89 Am J Intl L at 706 (cited in note 6); Vázquez, 122 Harv L Rev at 610 (cited in note 7); Jordan J. Paust, *Self-Executing Treaties*, 82 Am J Intl L 760, 760 (1988); see also Louis Henkin, *Foreign Affairs and the United States Constitution* 199 (2d ed 1996) (“[Chief Justice] Marshall [in *Foster*] . . . felt obligated to read an exception into the Supremacy Clause.”).

self-execution. Professor Vázquez has argued, for example, that “the concept of a non-self-executing treaty is in tension with the Supremacy Clause’s designation of treaties as ‘law,’” and that, as a result, “our Constitution should be read to establish a presumption that treaties are self-executing.”⁹

The most prominent counterpoint to this view has come from Professor John Yoo. In a lengthy article published in the *Columbia Law Review*, Yoo argued that the original understanding of the constitutional Founders was that treaties would not operate as domestic law when they (as is often the case today) addressed matters falling within the scope of Congress’s legislative authority.¹⁰ In a subsequent article, Yoo argued that requiring legislative implementation for many treaties is also supported by constitutional text and structure.¹¹ As an alternative to his constitutional claim, Yoo contended that there should at least be a presumption against treaty self-execution, such that the treaty-makers would be required to issue a “clear statement” if they wanted a treaty to be self-executing.¹²

At least before *Medellín*, it was unclear to what extent the case law supported one view or the other, although it seems fair to say that it did not implement what Professor Yoo claimed was the original understanding (as he essentially conceded). Courts have often enforced treaties directly without consideration of whether the treaties addressed matters falling within Congress’s legislative authority.¹³ In particular, as noted in the Restatement (Third) of Foreign Relations Law, “[p]rovisions in treaties of friendship, commerce, and navigation, or other agreements conferring rights on foreign nationals, especially in matters ordinarily governed by State law, have been given effect without any implementing legislation, their

⁹ Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum L Rev 2154, 2157, 2173 (1999).

¹⁰ See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum L Rev 1955 (1999).

¹¹ See John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum L Rev 2218 (1999).

¹² *Id.* at 2255. For critical responses to Yoo’s articles, see Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 Colum L Rev 2095 (1999), and Vázquez, 99 Colum L Rev 2154 (cited in note 9).

¹³ See, for example, *Kolovrat v Oregon*, 366 US 187 (1961) (applying treaty with Serbia to allow Yugoslavian nationals to inherit personal property from Oregon decedent); *Asakura v City of Seattle*, 265 US 332 (1924) (applying treaty with Japan to preempt Seattle ordinance that disallowed noncitizens from being licensed as pawnbrokers); *Ware v Hylton*, 3 US 199 (1796) (applying treaty with Great Britain to preempt Virginia statute that restricted ability of British creditors to recover on pre-Revolutionary War debts).

self-executing character assumed without discussion.”¹⁴ On the other hand, lower courts in recent years have often been reluctant to allow private judicial enforcement of treaties, especially multilateral treaties, so much so that it is arguable that the modern case law suggests a presumption against self-execution.¹⁵

Modern lower court decisions have also highlighted a number of uncertainties surrounding the self-execution doctrine. One uncertainty concerns the relevant intent that courts should look to in discerning self-execution. If self-execution is like the substantive terms in the treaty, then, as with a domestic contract, a court should attempt to discern the collective intent of the parties.¹⁶ Some courts have in fact suggested that approach, albeit without much analysis.¹⁷ The Restatement, by contrast, takes the position that the relevant intent is that of the U.S. treaty-makers—that is, the Senate and President¹⁸—and courts have in fact given particular weight to evidence of U.S. intent.¹⁹

Another, somewhat related uncertainty concerns the materials that courts should look at in discerning the relevant intent. The Court in *Foster* emphasized the treaty text, but it is not clear when treaty text will be deemed to suggest self-execution or non-self-execution. There have also been questions about the extent to which it is proper for courts to take account of nontextual materials, such as drafting or ratification history. In the 1970s and 1980s, some lower courts developed multifactor tests for self-execution. These factors included the following considerations:

¹⁴ Restatement (Third) of the Foreign Relations Law of the United States, § 111, reporters’ note 5 (1987).

¹⁵ See, for example, *United States v Emuegbunam*, 268 F3d 377, 389 (6th Cir 2001) (“As a general rule, however, international treaties do not create rights that are privately enforceable in the federal courts.”); *United States v Li*, 206 F3d 56, 60 (1st Cir 2000) (en banc) (“[T]reaties do not generally create rights that are privately enforceable in the federal courts.”); *Goldstar (Panama) S.A. v United States*, 967 F2d 965, 968 (5th Cir 1992) (“International treaties are not presumed to create rights that are privately enforceable.”).

¹⁶ See, for example, *Air France v Saks*, 470 US 392, 399 (1985) (noting that, when interpreting the meaning of a treaty, U.S. courts attempt “to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties”); *Societe Nationale Industrielle Aerospatiale v United States District Court*, 482 US 522, 533 (1987) (“In interpreting an international treaty, we are mindful that it is ‘in the nature of a contract between nations,’ to which ‘general rules of construction apply.’”).

¹⁷ See cases cited in note 66.

¹⁸ See text accompanying note 68.

¹⁹ See David H. Moore, *An Emerging Uniformity for International Law*, 75 Geo Wash L Rev 1, 12–14 (2006); Vázquez, 89 Am J Int L at 705 n 47 (cited in note 6).

(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute.²⁰

Some courts also have suggested that deference should be given to the views of the Executive Branch, at the time of the litigation, with respect to whether a treaty is self-executing.²¹

Courts have also had to address the effect of “non-self-execution declarations” attached by the Senate to its advice and consent to some treaties. Since early in U.S. history, the Senate has had a practice of qualifying its consent to certain treaties through the adoption of reservations and other limitations.²² Starting in the 1970s, with the support of the Executive Branch, the Senate began considering the adoption of “non-self-execution declarations” in connection with its consent to the ratification of human rights treaties, and it began adopting these declarations in the early 1990s. These declarations have been voted on by the Senate as part of its resolution of advice and consent to the treaties, and have been typically included in the U.S. instrument of ratification that is communicated to the other treaty parties. Before *Medellín*, the Senate had utilized these formal non-self-execution declarations in connection with a few treaties outside the human rights area as well, but such declarations were uncommon. For most treaties, the Senate and Executive Branch either did not express a view about self-execution, or they expressed a view in less formal ratification materials, such as the President’s letter of transmittal to the Senate or the report of the Senate Committee on Foreign Relations.

As Professor Jack Goldsmith and I have explained, the U.S. treaty-makers have articulated a number of reasons for using the formal non-self-execution declarations in the human rights area:

First, they believe that, taking into account the substantive reservations and interpretive conditions, U.S. domestic laws and

²⁰ *Frolova v Union of Soviet Socialist Republics*, 761 F2d 370, 373 (7th Cir 1985); see also, for example, *United States v Postal*, 589 F2d 862, 877 (5th Cir 1979).

²¹ See, for example, *More v Intelcom Support Services, Inc.*, 960 F2d 466, 472 (5th Cir 1992).

²² See Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U Pa L Rev 399, 400–402 (2000).

remedies are sufficient to meet U.S. obligations under human rights treaties. There is thus no additional need, in their view, for domestic implementation. Second, there is concern that the treaty terms, although similar in substance to U.S. law, are not identical in wording and thus might have a destabilizing effect on domestic rights protections if considered self-executing. Third, there is disagreement about which treaty terms, if any, would be self-executing. The declaration is intended to provide certainty about this issue in advance of litigation. Finally, the treaty-makers believe that if there is to be a change in the scope of domestic rights protections, it should be done by legislation with the participation of the House of Representatives.²³

Although courts consistently have treated these declarations as dispositive of the issue of self-execution,²⁴ some commentators have questioned their validity, arguing, among other things, that they are at odds with the Supremacy Clause.²⁵

An important recent addition to the literature on self-execution came from Professor Tim Wu.²⁶ Professor Wu analyzed the patterns of judicial enforcement of treaties throughout U.S. history and found that courts had consistently enforced treaties in cases involving state breaches of treaty obligations, but that, as a result of institutional deference, they often had not enforced treaties when they perceived that doing so would conflict with the wishes of Congress or, at least in some instances, the Executive Branch. Professor Wu further concluded that, as his institutional deference explanation would predict, the role for direct judicial enforcement of treaties has been eroded by the twentieth-century rise of congressional-executive agreements, since, he argued, these agreements shift implementation authority from the courts to Congress.

Not surprisingly, the Court's decision in *Medellín* is spurring a

²³ Id at 419–20.

²⁴ See, for example, *Renkel v United States*, 456 F3d 640, 644 (6th Cir 2006) (collecting cases); *Auguste v Ridge*, 395 F3d 123, 141 n 17 (3d Cir 2005) (same).

²⁵ See, for example, Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 Geo Wash J Intl L & Econ 49, 64 (1997); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DePaul L Rev 1287, 1302–04 (1993); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 UC Davis L Rev 1, 46–55 (2002); cf. Henkin, *Foreign Affairs and the United States Constitution* at 202 (cited in note 8) (arguing that the practice of non-self-execution declarations “is ‘anti-Constitutional’ in spirit and highly problematic as a matter of law”).

²⁶ See Tim Wu, *Treaties’ Domains*, 93 Va L Rev 571 (2007).

new round of debate over treaty self-execution.²⁷ In a recent article in the *Harvard Law Review*, Professor Vázquez further develops arguments from his past writings on the subject.²⁸ He contends that, as a result of the Supremacy Clause, there should be a “requirement of equivalent treatment”—that is, that “treaties are presumptively enforceable in court in the same circumstances as constitutional and statutory provisions of like content.”²⁹ In addition, while he accepts that *Foster*-type non-self-execution can be an exception to this requirement, he contends that there should be a presumption in favor of self-execution “that can be overcome only through a clear statement that the obligations in a particular treaty are subject to legislative implementation.”³⁰

The Senate has also adjusted its practices after *Medellín*, and its adjustments are raising new questions. The Senate is expressing its views about self-execution more frequently than in the past, and it is more consistently doing so in its formal resolution of advice and consent rather than in less formal ratification materials.³¹ At the same time, the Senate has not been recommending that these formal declarations be included with the U.S. instrument of ratification that is communicated to the other treaty parties.³² Finally, the Senate has for the first time been attaching *self-execution* as well as non-self-execution declarations to its advice and consent to some treaties,³³ and there is some question about whether those new decla-

²⁷ For an online debate that occurred shortly after the decision, see *Federalist Society Online Debate, Medellín v. Texas, Part I: Self-Execution* (March 28, 2008) (featuring Ted Cruz, David Sloss, Nick Rosenkranz, and Edwin Williamson), at <http://www.fed-soc.org/debates/dbtid.17/default.asp>.

²⁸ See Vázquez, 122 Harv L Rev 599 (cited in note 7).

²⁹ Id at 602.

³⁰ Id.

³¹ See, for example, Exec Rep 110–12, 110th Cong, 2d Sess, *Extradition Treaties with the European Union* at 9 (Sept 11, 2008) (“Such a statement, while generally included in the documents associated with treaties submitted to the Senate by the executive branch and in committee reports, has not generally been included in Resolutions of advice and consent.”), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:er012.110.pdf.

³² See, for example, Exec Rept 110–19, 110th Cong, 2d Sess, *International Convention on the Control of Harmful Anti-Fouling Systems on Ships* at 9–10 (Sept 11, 2008) (indicating that a declaration of non-self-execution, unlike a different declaration included in the resolution of advice and consent, would not be included in the instrument of ratification), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:er019.pdf.

³³ See 154 Cong Rec S9328–S9332 (Sept 23, 2008) (senatorial advice and consent for various mutual legal assistance, extradition, and tax treaties, containing a declaration for each one stating that, “This Treaty is self-executing.”).

rations are constitutionally valid.³⁴

There are a number of issues at stake in the self-execution debate. As suggested above, one issue concerns the validity of non-self-execution and self-execution declarations attached by the Senate to its advice and consent to some treaties. To the extent that these declarations are valid and binding, their increased use will simplify the self-execution question going forward. The United States is already a party to thousands of treaties, however, that lack such Senate declarations. It seems likely after *Medellín* that treaties that fall within established lines of self-execution precedent, such as bilateral treaties granting aliens property or business rights, will continue to be treated as self-executing. It is uncertain, however, to what extent treaties not covered by existing lines of precedent, and which lack Senate declarations, will be viewed as judicially enforceable. One example is the Vienna Convention on Consular Relations, which gives arrested foreign nationals the right to have their consulate notified of their arrest and to communicate with their consulate.³⁵ As will be discussed, this treaty provision forms part of the backdrop of the *Medellín* case, although the Supreme Court reserved judgment on whether it was self-executing. The Geneva Conventions governing the treatment of classes of individuals during wartime are another example, as detainees in the war on terrorism have sought to invoke them to challenge their detention, treatment, and trial.³⁶ Whether these and other treaties will be found to be self-executing will be affected by whatever presumption (if any) that courts apply with respect to self-execution and by the types of materials that courts consider in making the determination.

II. SUPREME LAW OF THE LAND

In this part, I stake out my first claim: the Supremacy Clause does not by itself tell us the extent to which treaties should be judicially enforceable. The Supremacy Clause states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” Critics of non-self-

³⁴ See, for example, Vázquez, 122 Harv L Rev at 685–94 (cited in note 7) (doubting the constitutional validity of self-execution declarations).

³⁵ See Vienna Convention on Consular Relations, Art 36.

³⁶ See, for example, *Hamdan v Rumsfeld*, 415 F3d 33, 38–40 (DC Cir 2005) (concluding that the Third Geneva Convention was not judicially enforceable), reversed on other grounds, 548 US 557 (2006).

execution emphasize the word “all” and suggest that non-self-execution is problematic because it means that not all treaties are judicially enforceable. In making this argument, critics incorrectly equate supreme law of the land with automatic judicial enforceability.

A brief consideration of the other forms of supreme federal law—federal statutes and the Constitution—shows that judicial enforceability is not a prerequisite for status as supreme law of the land. Suits by citizens who are not concretely injured by government lawbreaking cannot bring suit, even if it means that no one can ever bring the suit.³⁷ Certain constitutional questions are considered nonjusticiable political questions.³⁸ Congress can sometimes deprive the courts of jurisdiction to hear federal statutory claims, such as statutory claims relating to discretionary agency action.³⁹ States have broad immunity from suit on federal law claims, even though they are obligated to comply with federal law.⁴⁰ Conditional spending provisions and statutory delegations of discretionary authority to the Executive are also often not judicially enforceable.⁴¹ In all of these and similar situations we do not think that there is any violation of, or even tension with, the Supremacy Clause.

Even when a statute is judicially enforceable, Congress often uncontroversially regulates the extent to which it is enforced, and how it is enforced, further suggesting that the Supremacy Clause does not deprive the national political branches of flexibility over this issue. Thus, for example, even though the Supremacy Clause makes statutes supreme over state law, Congress sometimes enacts statutes that expressly do not preempt state law.⁴² Moreover, it is not un-

³⁷ See, for example, *United States v Richardson*, 418 US 166, 179 (1974) (“[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.”).

³⁸ See, for example, *Nixon v United States*, 506 US 224 (1993).

³⁹ See, for example, *Webster v Doe*, 486 US 592 (1988).

⁴⁰ See, for example, *Alden v Maine*, 527 US 706 (1999); *Seminole Tribe of Florida v Florida*, 517 US 44 (1996).

⁴¹ See, for example, *Gonzaga University v Doe*, 536 US 273 (2002) (disallowing private enforcement of Family Educational Rights and Privacy Act); *Dept of the Navy v Egan*, 484 US 518, 526–30 (1988) (disallowing review of denial of security clearance).

⁴² See, for example, 15 USC § 7707(b)(2) (stating that statute relating to electronic mail “shall not be construed to preempt” certain state laws); 18 USC § 896 (stating that statute relating to extortionate credit transactions “does not preempt any field of law with respect to which State legislation would be permissible in the absence of this [statute]”).

common for Congress to limit standing to sue or to expressly or implicitly preclude private rights of action.⁴³ It is also widely accepted that Congress can limit the domestic enforceability of congressional-executive agreements, which constitute the vast majority of the international agreements concluded by the United States in the modern era (and which constitute binding “treaties” under international law).⁴⁴

Statutes delegating implementation authority to the Executive provide a particularly close analogy to non-self-executing treaties. Consider, for example, the statute at issue in the famous foreign affairs case, *United States v Curtiss-Wright Export Corp.*⁴⁵ The statute there authorized President Franklin Roosevelt to criminalize the sale of arms to two countries involved in a conflict in Latin America if he found that such criminalization “may contribute to the reestablishment of peace between those countries.” Before Roosevelt implemented this statute, it would not have been judicially enforceable, and yet it still would have been part of the “Laws of the United States” referenced in the Supremacy Clause. In a treaty, the Senate and President might similarly delegate domestic implementation discretion to nonjudicial actors—that is, to either Congress or the Executive Branch. Many statutory provisions are like this, and no one thinks that the Supremacy Clause requires that these provisions create self-executing rules of decision for the judiciary.

Ironically, supporters of broad treaty enforcement should be the last ones to tie law status to judicial enforcement. Judicial review is often unavailable on the international plane to enforce treaty and other legal obligations. That fact, along with the frequent absence of other formal enforcement machinery, has sometimes led people to question whether international law is really “law.” The prevailing

⁴³ See, for example, 6 USC § 134 (stating, in information infrastructure statute, that “[n]othing in this part may be construed to create a private right of action for enforcement of any provision of this chapter”); 12 USC § 1831g(d) (stating, in banking statute, that “[t]his section may not be construed as creating any private right of action”). See also Paul B. Stephan, *Private Remedies for Treaty Violations After Sanchez-Llamas*, 11 Lewis & Clark L Rev 65 (2007).

⁴⁴ For example, Congress restricted the domestic judicial enforceability of the GATT and NAFTA trade agreements. See 19 USC § 3512; 19 USC § 3312. For acceptance of this congressional authority, see, for example, Henkin, *Foreign Affairs and the United States Constitution* at 217 (cited in note 8); Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 Chi Kent L Rev 515, 525–26 (1991); Stefan A. Riesenfeld and Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 Chi Kent L Rev 571, 641 (1991).

⁴⁵ 299 US 304 (1936).

view among international law scholars, however, is that international law can meaningfully be described as law despite the frequent absence of formal enforcement mechanisms, including the absence of judicial review.⁴⁶ Supporters of a broad approach to treaty self-execution are particularly likely to hold this view about international law. Yet if international law can be law on the international plane without judicial enforceability, why is that not also true on the domestic plane?

Of course, there is a *relationship* between a law's status as supreme law of the land and judicial enforceability, a relationship highlighted by the statement in the Supremacy Clause that state judges shall be bound by the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." The supreme law of the land takes precedence over conflicting state law, and one method of enforcing that supremacy is through the courts. But this relationship is not a necessary one. If in concluding the treaty the Senate and President have validly precluded judicial enforcement (an issue addressed in the next part), then the state judges clause does not come into play. The inclusion of treaties in the Supremacy Clause simply, but very importantly, allows the U.S. treaty-makers to preempt state law *if they want to*, without the possibility that state legislatures or judges will nullify the preemption.

The argument for more mandatory judicial review of treaty obligations depends on a separation-of-powers-oriented, rather than federalism-oriented, construction of the Clause. Critics of non-self-execution argue that treaties were included in the Supremacy Clause to help avert U.S. treaty violations, something that they contend will be more likely to occur without self-execution.⁴⁷ As an initial matter, it is important to remember that U.S. compliance with its treaty obligations generally does not depend on self-execution. There are many ways for a nation to comply with a treaty without

⁴⁶ See, for example, Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990); Louis Henkin, *How Nations Behave* (2d ed 1979); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 Yale L J 2599 (1997).

⁴⁷ See, for example, Sloss, 36 UC Davis L Rev at 16 (cited in note 25) ("The Framers included treaties in the Supremacy Clause to help promote U.S. compliance with its treaty obligations."); Vázquez, 89 Am J Intl L at 706 (cited in note 6) (contending that treaties were included in the Supremacy Clause "to avert conflicts with other nations that could be expected to result from violations of treaties attributable to the United States"); Vázquez, 122 Harv L Rev at 675 (cited in note 7) ("It was to avoid such friction that the Constitution gave treaties the force of domestic law and instructed judges to give them effect.").

direct judicial application, including preexisting legislation, new legislation, and executive action, and U.S. compliance with most treaties is not in fact accomplished through its courts. As discussed below in Part III, treaties are never self-executing in some countries, and yet those countries generally manage to comply. Critics of political branch flexibility with respect to the issue of self-execution also neglect to consider the *ex ante* effects of eliminating such flexibility. Among other things, if the political branches could not regulate the domestic effects of treaties, they would likely enter into fewer, and less significant, treaty commitments.⁴⁸

In any event, the “compliance” description of the Supremacy Clause is potentially misleading because it neglects to mention the breaching parties that the Founders were worried about—the states. Almost everyone agrees that the inclusion of treaties in the Supremacy Clause was a response to a specific problem under the Articles of Confederation, which is that the Articles did not give the national government sufficient authority to ensure state compliance with treaty obligations. This was particularly an issue with respect to the 1783 peace treaty with Great Britain, which had a provision requiring that British creditors be allowed to collect on pre-Revolutionary War debts. Because some states had enacted laws preventing compliance with that provision, the British refused to comply with a provision in the treaty obligating them to vacate military forts in the northwest. The Continental Congress took the position that the treaty was “part of the law of the land” binding on the states,⁴⁹ but this was not expressly stated in the Articles of Confederation. Perhaps because of this, the Continental Congress simply proceeded to *request* that the states repeal any laws inconsistent with the peace treaty, which generated compliance from some but not all of the states.

During the Constitutional Convention, the “Virginia Plan” would have addressed the problem of state noncompliance with federal law by giving the national legislature the power to “negative” state laws, an idea particularly championed by James Madison. The proposed negative approach was ultimately rejected at the Con-

⁴⁸ See, for example, Bradley and Goldsmith, 149 U Pa L Rev at 410–16 (cited in note 22) (documenting how non-self-execution declarations and other conditions helped break the logjam that had prevented U.S. ratification of human rights treaties).

⁴⁹ See 32 Journals of the Continental Congress 124 (March 21, 1787); see also 32 Journals of the Continental Congress 177 (April 13, 1787).

vention, in part because it was thought to intrude too much on state sovereignty. Instead, the Convention adopted the Supremacy Clause, a version of which was originally set forth in the "New Jersey Plan." As originally proposed, the Supremacy Clause stated that treaties and other federal laws would be "supreme law of the respective States."⁵⁰ As submitted to the Committee of Style near the end of the Convention, the Clause still referred to the "supreme law of the several States."⁵¹ The Committee changed the wording of the Clause, without explanation, to the "supreme Law of the Land."⁵²

Madison maintained throughout the Convention that the Supremacy Clause approach was inadequate to ensure against state violations of federal law, including treaties.⁵³ In defending the Constitution in *The Federalist Papers*, however, he argued that including treaties in the Supremacy Clause should be considered unobjectionable given that the Continental Congress could already "make treaties which they themselves have declared and most of the States have recognized, to be the supreme law of the land."⁵⁴ As Madison's implicit reference to the British peace treaty experience suggests, the Federalist defense of the Supremacy Clause was framed in terms of the relationship between the national government and the states. For example, Hamilton complained in Federalist No. 22 that, under the Articles of Confederation, treaties were "liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures," with the result that "[t]he faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."⁵⁵ The state ratification debates, as Professor Julian Ku has observed, similarly "focused on what we would recognize today as the federalism question," and they "appear to confirm that the new

⁵⁰ I *The Records of the Federal Convention of 1787* at 245 (Max Farrand ed, 1911).

⁵¹ II *The Records of the Federal Convention of 1787* at 572 (Max Farrand ed, 1911).

⁵² See generally Christopher R. Drahozal, *The Supremacy Clause: A Reference Guide to the United States Constitution* (2004).

⁵³ See, for example, I *The Records of the Federal Convention of 1787* at 316 (cited in 50) (expressing concern that the New Jersey Plan would not sufficiently prevent individual states from imposing on the whole country a "rupture with other powers").

⁵⁴ Federalist 38 (Madison) in Clinton Rossiter, ed, *The Federalist Papers* 238 (1961).

⁵⁵ Federalist 22 (Hamilton) in *The Federalist Papers* at 151 (cited in note 54).

Constitution was intended to prevent the state violations of treaties that had occurred during the Articles period.”⁵⁶

These materials suggest that the Founders did not want U.S. compliance with treaties to be dependent on state law. The Founders understandably concluded that, unless it was clear that treaties took precedence over state law, an individual state could enact laws that would impose harmful externalities on the entire nation, and the national government would be powerless to prevent it. As Justice Chase would later explain in a decision applying the British peace treaty to preempt a Virginia statute, “[a] treaty cannot be the supreme law of the land, that is of all the United States, if any act of a state legislature can stand in its way.”⁵⁷ The Founders *might* have assumed as well that the usual mechanism for ensuring state compliance with treaties would be judicial review, although Professor Yoo has contested this proposition.

Nothing in this history, however, suggests that treaties were included in the Supremacy Clause in order to empower the courts to deter or redress *national government* breaches of treaties, or in any other way limit the national political branches’ control over treaty compliance. Indeed, the entire thrust of the adoption of the Supremacy Clause was one of empowering the national government to operate more effectively. As Professor Christopher Drahozal notes in his book on the Supremacy Clause:

Certainly the Supremacy Clause does away with the question under the Articles of Confederation of whether *states* have to implement treaties before they take effect. That possibility, the subject of debate and federal action in connection with the Treaty of Peace with Great Britain, is conclusively rejected by the Supremacy Clause. Beyond that, however, the resolution of the self-execution debate is less clear, at least with respect to the preemption of state law.⁵⁸

⁵⁶ Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 Ind L J 319, 377 (2005).

⁵⁷ *Ware v Hylton*, 3 US (3 Dall) 199, 236 (1796) (Chase, J); see also, for example, Alona E. Evans, *Self-Executing Treaties in the United States of America*, 30 Brit Year Book Intl L 178, 180–81 (1953) (“Experience under the Articles of Confederation lent support to the decision of the Constitutional Convention that, in a federal system, the conclusion of treaties must necessarily be within the exclusive competence of the Central government and that treaties must take precedence over the constitutions and laws of the several States.”).

⁵⁸ Drahozal, *The Supremacy Clause: A Reference Guide to the United States Constitution* at 160 (cited in note 52). John Jay, a particularly strong supporter of international law among the Founders, denied in Federalist 64 that treaties should be “repealable at pleasure” by

To put it differently, there is no reason to think that the Supremacy Clause removes the international political dimension of treaties, which leaves to national governments the ultimate responsibility for deciding whether and how to comply with treaty obligations, and for accepting whatever international consequences may flow from that decision. The Supremacy Clause simply ensures that in the United States this responsibility rests at the federal rather than state level.

The federalism orientation of the Supremacy Clause is further reflected in the fact that it refers only to state judges and state laws and does not mention the federal political branches. The Constitution addresses the Executive Branch's obligation to comply with federal law not in the Supremacy Clause but rather in the Take Care Clause of Article II.⁵⁹ As for Congress, it is well settled that Congress has the authority to override both treaties and statutes, despite their status as supreme law of the land.⁶⁰ Congress does of course have an obligation to comply with the Constitution, but the Supreme Court in *Marbury* described this obligation as emanating principally from the nature of a written constitution that assigns limited and enumerated powers to the national government rather than from the Supremacy Clause.⁶¹ The pattern of judicial enforcement of treaties throughout U.S. history also comports with a federalism rather than separation-of-powers understanding of the Supremacy Clause. As Professor Wu has found, most judicial enforcement of treaties has been directed at states and localities, and, even outside that context, courts have tended to "look for

the United States, but he was probably speaking there about the international plane rather than domestic plane, and in fact he remarked that "[t]he proposed Constitution . . . has not in the least extended the obligation of treaties." Federalist 64 (Jay) in *The Federalist Papers* at 394 (cited in note 54); see also Ku, 80 Ind L J at 378 (cited in note 56) ("Jay's claim that treaties could never be cancelled without agreement by the other treaty party reveals that he was probably analyzing treaties in their international character without taking into account the complications of how to carry out treaties under municipal law.").

⁵⁹ See US Const, Art II, § 3 (stating that the President "shall take Care that the Laws be faithfully executed").

⁶⁰ Congress obviously has the ability to override earlier congressional enactments. As for overriding earlier treaties, see, for example, *Whitney v Robertson*, 124 US 190, 195 (1888) (reasoning that Congress can override a treaty and explaining that "[t]he duty of the courts is to construe and give effect to the latest expression of the sovereign will").

⁶¹ *Marbury v Madison*, 5 US (1 Cranch) 137, 176–78 (1803). The Court did note at the end of its opinion, however, that it was not "entirely unworthy of observation" that the Constitution is listed before the "Laws of the United States" in the Supremacy Clause and that the phrase "Laws of the United States" in that Clause is qualified by the requirement that they be "made in Pursuance" of the Constitution. See *id* at 180.

signals from Congress or the Executive that might show who is meant to be responsible for enforcing a given treaty.”⁶²

Once the concept of supreme law of the land is viewed as potentially separate from automatic judicial enforceability, it is easier to understand contemporary judicial and political branch practice relating to treaties. Consider, for example, the non-self-execution declarations that the Senate and President sometimes include with their consent to treaties. These declarations are not an effort to turn off the Supremacy Clause, as some critics contend. They are simply an effort by the U.S. treaty-makers to regulate the separable issue of judicial enforceability. I will say more about these declarations in the next part, and I will address in that discussion other constitutional objections that might be raised against them. For now, it is important to note that, in order to conclude that they violate the Supremacy Clause, one would need to read that Clause as not only mandating direct judicial enforceability, but doing so even when the Senate and President expressly do not desire judicial enforceability, and even when they have concluded that other U.S. laws already place the United States in compliance with the treaty. Again, there is nothing in the history of the Supremacy Clause that suggests such a mandate.

More generally, if there is no inherent conflict between non-self-execution and the Supremacy Clause, it is more difficult to justify a general presumption in favor of self-execution, at least one premised on the purported policies of that Clause. Critics of non-self-execution typically describe the non-self-execution doctrine announced in *Foster v Neilson* as a problematic deviation from the Supremacy Clause. Although most critics are willing to accept that *Foster* has precedential force, they argue that its scope should be kept to a minimum given what the critics describe as its constitutionally dubious origins. Professor Vázquez contends, for example, that although “it is too late to reject *Foster*-type non-self-execution entirely[,] . . . *Foster* is reconcilable with the constitutional text only if accompanied by a strong presumption of self-execution.”⁶³ But if non-self-execution is not in fact at odds with the Supremacy Clause, then at least this argument for a presumption in favor of self-execution loses force.

⁶² Wu, 93 Va L Rev at 595 (cited in note 26).

⁶³ Vázquez, 122 Harv L Rev at 610, 643 (cited in note 7).

III. RELEVANT INTENT

My second claim is that, in discerning whether a treaty is self-executing, the relevant intent is that of the U.S. treaty-makers (i.e., the Senate and President), not the collective intent of the treaty parties. As I will explain, my claim does not depend on any particular view about the relevance of ratification history or other nontextual materials in the self-execution analysis. Indeed, my claim is compatible even with a pure “public meaning” approach to interpretation.⁶⁴

As Professor Vázquez has noted, “Courts and commentators seem to agree that a treaty’s self-executing character is largely, if not entirely, a matter of intent.”⁶⁵ There has been substantial uncertainty, however, over whose intent counts—the collective intent of the parties to the treaty, or just the intent of the U.S. Senate and President. Before *Medellín*, some lower courts had suggested, without analysis, that the collective intent of the parties is what matters,⁶⁶ and this is also the view of some commentators.⁶⁷ By contrast, the Restatement (Third) of Foreign Relations Law reasons that the intent of the U.S. treaty-makers should be dispositive. As the Restatement explains:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations.

⁶⁴ If it were appropriate to apply a public meaning approach to the issue of self-execution rather than an approach focused on intent, my claim would be that it should be the U.S. public meaning, not the international public meaning, that should be controlling, and that the materials relevant to the public meaning would include the declarations included by the Senate in its resolution of advice and consent. I do not explore here the precise implications of such an approach, since courts and scholars have to date framed the self-execution issue as one of intent, and that is how the issue is described in *Medellín*.

⁶⁵ Vázquez, 89 Am J Intl L at 704 (cited in note 6). See also, for example, Edwin D. Dickinson, *Are the Liquor Treaties Self-Executing?* 20 Am J Intl L 444, 449 (1926).

⁶⁶ See, for example, *United States v Postal*, 589 F2d 862, 876 (5th Cir 1979) (“The question whether a treaty is self-executing is a matter of interpretation for the courts when the issue presents itself in litigation, . . . and, as in the case of all matters of interpretation, the courts attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose.”); *Diggs v Richardson*, 555 F2d 848, 851 (DC Cir 1976) (“In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution.”).

⁶⁷ See, for example, Riesenfeld and Abbott, 67 Chi Kent L Rev at 608–09 (cited in note 44); Vázquez, 122 Harv L Rev at 638–41 (cited in note 7). The Supreme Court’s 1833 decision in *United States v Percheman*, discussed in Part IV, also could be read to suggest an intent-of-the-parties approach, since the Court there looked to a foreign language version of the treaty in discerning self-execution. See text accompanying note 104.

Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.⁶⁸

Although I do not always agree with the Restatement's claims, on this issue the Restatement is persuasive. Nations have widely varying approaches to the domestic status of treaties, with some nations (such as Great Britain) always requiring legislative implementation before treaties can be enforced by domestic courts, other nations allowing most or all treaties to be enforced directly by their courts, and still other nations allowing only some treaties to be enforced in this way.⁶⁹ Furthermore, international law generally does not concern itself with the particular institutions a nation uses to implement international obligations; nations are simply required to comply with their treaty obligations, and it does not matter whether they do so through their courts or through some other mechanism. As a leading international law casebook notes, "International law requires a state to carry out its international obligations but, in general, how a state accomplishes that result is not of concern to international law or to the state system."⁷⁰ For these reasons, nations almost never negotiate about treaty self-execution, especially for multilateral treaties. Moreover, parties negotiating a treaty are typically indifferent to the issue, so even tools used for contract gap filling would not work here. If the search for self-execution turned on the collective intent of the parties, it would almost always be a meaningless exercise.

Although some advocates of the intent-of-the-parties approach recognize that there will almost never be any collective intent with respect to self-execution,⁷¹ they argue that allowing senatorial and

⁶⁸ Restatement (Third) of the Foreign Relations Law of the United States, § 111, cmt. h (cited in note 14); see also John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am J Intl L 310, 329 (1992) ("It seems safe to conclude that the U.S. constitutional practice and status is that the treaty-making officials, as a unilateral matter, will control the determination of 'self-executing' in the domestic legal system.").

⁶⁹ See Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 Recueil des Cours 303, 315–19 (1992 IV); Duncan B. Hollis, *A Comparative Approach to Treaty Law and Practice*, in Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington, eds, *National Treaty Law and Practice* 1, 40–47 (2005).

⁷⁰ Lori F. Damrosch et al, *International Law: Cases and Materials* 160–61 (4th ed 2001).

⁷¹ See, for example, Vázquez, 122 Harv L Rev at 607 (cited in note 7) ("[E]xcept in the rarest of cases, courts searching for a common intent of the parties regarding the need for implementing legislation do so in vain.").

presidential intent to control on this issue would be unconstitutional because it would give the Senate and President a lawmaking power outside of the Article II Treaty Clause.⁷² While the Constitution allows the Senate and President to make law in the form of treaties, these commentators contend that this is true only when they do so in conjunction with one or more other nations. Therefore, the argument goes, if the regulation of self-execution is not done in conjunction with other nations, it is an unconstitutional exercise of lawmaking authority.

One problem with this constitutional argument is that it fails to distinguish between the making of substantive treaty commitments, which is governed by international law, and the self-execution issue, which, at least under current practice, concerns an issue of domestic law. The making of substantive treaty commitments requires the consent of one or more other nations because this is what is required by international law in order for there to be a binding treaty. Nations naturally bargain over those substantive terms, and, just as with domestic contracts, the relevant intent for those terms is the collective intent of the parties. Moreover, there is an interest in having relatively uniform interpretations of these terms among the parties, in part for reciprocity reasons. Self-execution, by contrast, is not a matter of international law—the United States would not violate international law by either having, or not having, self-execution. Nor is there any particular need or desire for uniformity in the approaches to self-execution. While one could imagine nations bargaining over whether to require direct judicial enforcement of a treaty, it almost never happens.

Although the regulation of self-execution could be described as a type of lawmaking power (and, as discussed below, the Supreme Court did refer to it this way in *Medellín*), it is not a constitutionally problematic lawmaking power when exercised by two-thirds of the Senate and the President. It is not a freestanding power, but rather is simply an adjunct to the treaty-making power set forth in Article II, and it only comes up if the full process for making a treaty has been satisfied. Moreover, it is not a power to create any new obligations for the United States, but rather is simply a power to regulate how those obligations are implemented internally. It can therefore reasonably be viewed as a lesser-included power of the

⁷² See, for example, *id.* at 639; Riesenfeld and Abbott, 67 *Chi Kent L Rev* at 599 (cited in note 44).

Senate and President's authority not to ratify the treaty at all, which would also prevent judicial enforcement of the treaty.⁷³ The principal argument against such a lesser-included power is that the Supremacy Clause forces the U.S. treaty-makers to accept judicial enforceability whenever they ratify a treaty susceptible to judicial enforcement. But, as discussed above in Part II, nothing in the text or history of the Clause, or in judicial precedent, suggests that the Clause operates in that way.

There is one lower court decision from the 1950s that offers support for the Treaty Clause argument, but it is poorly reasoned, was vacated as moot by the Supreme Court, and has had no influence since it was decided. That decision, *Power Authority of New York v Federal Power Commission*,⁷⁴ involved a treaty between the United States and Canada pursuant to which the two countries agreed to share water on the Niagara River. A preexisting federal statute gave the Federal Power Commission the authority to issue licenses concerning the use of U.S. waters. In approving the treaty with Canada, however, the Senate had attached to its advice and consent what it referred to as a "reservation" stating that "no project for redevelopment of the United States' share of such [Niagara River] waters shall be undertaken until it be specifically authorized by Act of Congress." As a result of this reservation, the commission concluded that it lacked authority to issue a license concerning the use of the Niagara River water.

In a 2–1 decision, the D.C. Circuit reversed the commission. The majority concluded that the Senate's reservation was constitutionally problematic, and the court therefore assumed that the Senate did not intend it to be binding. The court reasoned that the Constitution gives the Senate and President only the power to make a "Treaty," and that a treaty must concern matters of mutual concern to the other treaty parties. The court suggested, however, that the Senate's reservation was not part of the treaty because it "makes no change in the relationship between the United States and Canada under the treaty and has nothing at all to do with the rights or obligations of either party."⁷⁵ The court cited, with apparent ap-

⁷³ See Restatement (Third) of the Foreign Relations Law of the United States, § 303, reporters' note 4 (cited in note 14).

⁷⁴ 247 F2d 538 (DC Cir), vacated as moot sub nom, *American Public Power Association v Power Authority of New York*, 355 US 64 (1957).

⁷⁵ Id at 541.

proval, occasional statements by officials and courts suggesting that the Article II treaty power might be limited to matters of international concern.

The majority's analysis is questionable. There may be genuine reasons to be concerned about the scope of the treaty power, and I have myself highlighted some of those reasons in prior writings.⁷⁶ Among other things, the treaty power might be used to circumvent federalism restraints that would otherwise apply to Congress. But a decision by the Senate and President simply to defer an internal policy question for resolution by the full Congress, as in *Power Authority*, does not implicate these concerns. As the dissent explained in that case:

It may well be that, no matter how broad the power to make treaties, it is not without limits; and that, like any other power, it can be abused. This case, however, does not pose an abuse of the treaty power. The reservation in question is an instance of self-denial, not usurpation. It does not subvert our constitutional system. It was motivated by a desire that the treaty power should not be used in a manner which would exclude the Congress at large and the President from playing their normal roles in making domestic law.⁷⁷

Professor Henkin, in a trenchant article criticizing the decision, similarly explained that “[t]here has been no *mala fides*, no ‘repeal’ of legislation, no ‘colorable use of the treaty-making power’ for an extraneous, improper purpose. The President and Senate have merely refused to throw new and valuable resources into an old established system of development which Congress may not have intended and may not now desire.”⁷⁸

In any event, the decision has had essentially no influence. Not a single court has relied on this decision since it was issued more than fifty years ago.⁷⁹ Nor has the decision affected political branch practice, which, since the decision, has developed to include the use

⁷⁶ See Bradley, 97 Mich L Rev at 390 (cited in note 3); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 Mich L Rev 98 (2000). See also Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv L Rev 1867 (2005).

⁷⁷ 247 F2d at 552 (Bastian dissenting).

⁷⁸ Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 Colum L Rev 1151, 1173 (1956).

⁷⁹ One dissenting judge relied on it. See *Igartua-de la Rosa v United States*, 417 F3d 145, 191 (1st Cir 2005) (Howard dissenting).

of non-self-execution declarations. These declarations have consistently been upheld by the lower courts, and the Supreme Court recently suggested that they are valid.⁸⁰ Even in academic writings, the *Power Authority* decision has not been invoked extensively. One likely reason is that its suggestion that the treaty power might be limited to matters of international rather than domestic concern is a difficult distinction to apply in practice and could easily lead to undesirable consequences. If applied stringently, this distinction might render invalid the U.S. ratification of a variety of important treaties, including many human rights treaties, since those treaties do not involve reciprocal promises in the traditional sense. (The U.S. government does not condition its promise to respect the human rights of its citizens on other countries' respect for the human rights of their citizens.) Probably in part for this reason, the Restatement (Third) of Foreign Relations rejects any effort to have treaty validity turn on the domestic-versus-international distinction.⁸¹

The intent-of-the-U.S. approach is not only constitutionally valid; it also best explains judicial and political branch practice. Unlike an intent-of-the-parties approach, this approach has an easy time explaining the consistent deference that courts have given to non-self-execution declarations attached by the Senate and accepted by the President. Under the intent-of-the-U.S. approach, these declarations are clear evidence of senatorial and presidential intent concerning self-execution, which is the relevant intent for this issue. Commentators who argue for an intent-of-the-parties approach, by contrast, either find these declarations unconstitutional or have a difficult time explaining their validity.⁸² Moreover, the intent-of-the-U.S. approach would find valid the recent *self-execution* decla-

⁸⁰ See *Sosa v Alvarez-Machain*, 542 US 692, 735 (2004) (noting that the United States ratified the International Covenant on Civil and Political Rights "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts") (emphasis added).

⁸¹ See Restatement (Third) of the Foreign Relations Law of the United States, § 302, cmt. c and reporters' note 2 (cited in note 14).

⁸² See, for example, Riesenfeld and Abbott, 67 Chi Kent L Rev at 296 (cited in note 44) (arguing that "the Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts"); Sloss, 36 UC Davis L Rev at 41–43 (cited in note 25) (arguing that the declarations are invalid when used in certain ways); Vázquez, 122 Harv L Rev at 672–85 (cited in note 7) (struggling with the issue and ultimately concluding that the declarations are valid based on a complicated analysis of the international law validity of a hypothetical reservation of non-self-execution).

rations attached by the Senate, as long as the treaty was otherwise susceptible to judicial application. An intent-of-the-parties approach, by contrast, would likely see these declarations as unconstitutionally expanding the international obligations of the United States.⁸³ It is also worth noting that, outside of the human rights area, declarations concerning self-execution have not typically been included in the instruments of ratification that are communicated to the other treaty parties, and the Senate has not been recommending their inclusion in these instruments after *Medellín*.⁸⁴ Such communication would presumably be a constitutional prerequisite, however, under an intent-of-the-parties approach.⁸⁵ All of this purported unconstitutionality should at least give us pause before committing to the intent-of-the-parties approach.⁸⁶

The intent-of-the-U.S. approach also explains why it is perfectly appropriate for courts to consider treaty text when discerning self-execution, as they have done since *Foster*. Treaty text is relevant under this approach because it is what the Senate and President specifically approve when agreeing to the treaty, just as statutory text is relevant in discerning congressional intent with respect to whether and to what extent a statute is to be judicially enforceable. This is true, under the intent-of-the-U.S. approach, regardless of whether the treaty text would mean something different to other treaty parties on this question of self-execution (or mean nothing at all to them on this question). The textual question under the intent-of-the-U.S. approach is, simply, did the Senate and President intend in agreeing to this language that the treaty would be directly enforceable in U.S. courts? As discussed below, this is precisely the reasoning of the Supreme Court in *Medellín*. Supporters of the intent-of-the-parties approach, by contrast, have a difficult time

⁸³ See Vázquez, 122 Harv L Rev at 687–88 (cited in note 7). Professor Vázquez attempts to use the purported unconstitutionality of such declarations as a reason for a presumption in favor of self-execution. See *id.* at 690–91. If the self-execution declarations are in fact constitutional, that reason goes away.

⁸⁴ See text accompanying note 32.

⁸⁵ See, for example, Vázquez, 122 Harv L Rev at 641 (cited in note 7) (arguing for such a requirement).

⁸⁶ Congress's ability to regulate self-execution may also be at stake. Compare Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 Am J Intl L 73, 89–91 (2007) (arguing that a congressional restriction on judicial enforcement of the Geneva Conventions would be unconstitutional), with Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 Am J Intl L 322, 339–41 (2007) (challenging that claim).

explaining why text is relevant. Professor Vázquez, for example, criticizes judicial reliance on treaty text in discerning whether treaties are self-executing:

Because nations negotiating treaties rarely, if ever, select the wording of a treaty with the question of legislative implementation in mind, judges who draw conclusions about this question from treaty text are very likely attributing to the words a meaning *that was not intended by the parties*.⁸⁷

As made clear by the italicized language, this argument only holds if the relevant intent is that of the parties, which, as I have argued, it is not.

Contrary to what some commentators appear to assume, an endorsement of the intent-of-the-U.S. approach, by allowing for unilateral declarations of self-execution or non-self-execution, does not require acceptance of something akin to legislative history in the statutory context. Unlike legislative history, declarations regarding self-execution are subject to the same domestic process as the underlying enactment: the declarations are voted on by the Senate as part of its resolution of advice and consent and take effect only if the President decides to proceed with ratification after being presented with them. These declarations are therefore in effect part of the relevant text, not a mere piece of legislative history.⁸⁸ The extent to which a court should look at *other* materials in discerning the intent of the U.S. treaty-makers, such as ratification history, depends on one's theory of interpretation, and no particular conclusion on this is compelled by the intent-of-the-U.S. approach. That said, even hard-line textualists who resist the use of legislative history might accept the relevance of certain considerations beyond the words of the treaty, to the extent that those considerations shed light on how the text would likely be understood by the U.S. treaty-makers (or the relevant domestic public) with respect to the issue of self-execution. These considerations might include the extent to

⁸⁷ Vázquez, 122 Harv L Rev at 635 (cited in note 7) (emphasis added); see also *id* at 640 (“[T]he treaty itself will almost never have any relevant content on the question of direct enforceability.”); *id* at 660 (“[V]irtually all treaties have no relevant content on the question of direct versus indirect judicial enforceability.”).

⁸⁸ The Senate Foreign Relations Committee sometimes expresses a view about self-execution in the ratification materials rather than in a formal declaration included with the Senate's resolution of advice and consent. I am referring here only to the formal declarations.

which Congress has already regulated the subject covered by the treaty, the existence or nonexistence of a history of domestic judicial enforcement of similar treaty terms, and perhaps even the structural or functional consequences of self-execution or non-self-execution. As a result, there are likely to be materials for courts to work with beyond the words of the treaty regardless of whether they consider statements made in the ratification history.

In sum, when the United States enters into a treaty, one of the decisions it can make concerns whether and to what extent the treaty is to be implemented directly by its courts. Although this decision may have international consequences, it does not typically involve an international bargain, and it is not determined by international law. Instead, it concerns a political decision about how the nation will address its treaty obligations, a decision that may be influenced by a mix of structural, diplomatic, and policy considerations. The proper institutions to make this decision are the political institutions involved in committing the United States to the underlying treaty obligations, and it is therefore their intent that it is relevant.

IV. STATUTES AND TREATIES

As discussed in Part II, there are a variety of situations in which federal statutes are not judicially enforceable, even though statutes are part of the supreme law of the land. Proponents of a broad doctrine of treaty self-execution respond that, even if this is so, treaties should be no *less* enforceable than federal statutes, something that Professor Vázquez calls “the requirement of equivalent treatment.”⁸⁹ My third claim, which I defend in this part, is that there are important differences between statutes and treaties that are relevant to judicial enforceability, and these differences suggest less of a judicial role for enforcing treaties than for statutes, especially in the modern (i.e., post-New Deal and World War II) era.

One difference between statutes and treaties concerns the way that they are drafted. Because treaties are international bargains that reflect the input of other nations, they are less likely than statutes to be drafted with either extant U.S. law or the U.S. legal system in mind. As a result, it is not uncommon for treaties to use legal terms and concepts that are different from those typically used in the United States, even when the policies of the treaties are

⁸⁹ Vázquez, 122 Harv L Rev at 602 (cited in note 7).

otherwise in accord with U.S. law. In addition, while treaties are increasingly drafted to achieve statute-like objectives, the need to find common ground among countries with widely varied legal systems, cultures, and preferences often results in a lack of linguistic precision. These drafting differences between statutes and treaties are likely to be particularly evident for multilateral treaties that have numerous parties.

Another difference between statutes and treaties is that treaties are less likely to envision domestic courts, or even judicial review more generally, as the vehicle of their enforcement. Whereas U.S. statutes are enacted against the backdrop of a well-developed practice of judicial review that includes a centralized national court system, treaties are negotiated against the backdrop of a decentralized system with a wide variety of legal systems, and the drafters often envision different enforcement mechanisms than statutes, most commonly diplomacy, but sometimes (as in the case of the United Nations Charter provision at issue in *Medellín*) coordinated international sanctions. While it may seem strange in this country to think of law as divorced from judicial review, as explained in Part II, this is not at all strange on the international stage, and international lawyers have long insisted that international law is law despite the absence of judicial enforceability.

Unlike statutes, treaties are also a hybrid of contract and law. Treaties inherently involve contractual commitments to other nations and thus implicate considerations of international politics and diplomacy, considerations that are particularly the domain of the Executive Branch. To be sure, proponents of presumptive self-execution understandably bristle when courts (including the Court in *Medellín*) quote from the *Head Money Cases* for the proposition that “[a] treaty is primarily a compact between independent nations” that “depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.”⁹⁰ Proponents correctly note that the Court further observed in that case that “a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law and which are capable of enforcement as between private

⁹⁰ *Edye v Robertson* (*Head Money Cases*), 112 US 580, 598 (1884).

parties in the courts of the country.”⁹¹ Nevertheless, the language from the *Head Money Cases* reflects an important truth, which is that, unlike statutes, treaties operate not only within the domain of law, but also within the domain of international politics. The hybrid nature of treaties helps explain why they are probably subject to termination by the President unilaterally,⁹² whereas this is of course not true for statutes.⁹³ It also explains why courts tend to give greater deference to Executive interpretations of treaties than they give to Executive interpretations of statutes (even taking into account the *Chevron* deference doctrine in administrative law).⁹⁴

Treaties and statutes also differ in the way that they engage with the U.S. democratic process. Statutes are enacted after two houses of Congress deliberate on and approve them, often with much wrangling over the text, and they are signed by the President or passed with enough votes to override the President’s veto. Treaties, by contrast, are negotiated by the President and then approved by a supermajority of the Senate, which as a matter of practice has little if any involvement in negotiating the treaty’s text and, subject to an ability in some instances to decline consent to particular treaty provisions, has no authority to amend the product of the negotiation. By leaving out the House of Representatives entirely and leaving even the Senate out of the negotiation and drafting process, treaty-making involves less of the machinery of representative U.S. democracy than do statutes. Indeed, this is a principal point cited by supporters of the use of congressional-executive agreements, which involve the full Congress.⁹⁵ Even if there are advantages to

⁹¹ *Id.*

⁹² See *Goldwater v Carter*, 617 F2d 697 (DC Cir 1979), vacated, 444 US 886 (1979).

⁹³ Professor Vázquez spends considerable effort seeking to rebut the proposition that the contractual nature of treaties prevents them from being enforced through domestic courts. See Vázquez, 122 Harv L Rev at 623–27 (cited in note 7). That proposition is not a serious one, however, and it is not my contention here. Nor does Professor Vázquez’s rebuttal of that proposition establish, as he ultimately asserts, that the contractual nature of treaties is “irrelevant” to the self-execution issue. See *id.* at 626 (referring to the purported “irrelevance” of the fact that treaties are contracts between nations).

⁹⁴ See, for example, *Sumitomo Shoji America, Inc. v Avagliano*, 457 US 176, 184–85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); see also *Medellín v Texas*, 128 S Ct 1346, 1361 (2008). Unlike *Chevron* deference, courts defer to Executive interpretations of treaties even when expressed for the first time in litigation. See, for example, *De Los Santos Mora v New York*, 524 F3d 183, 204 (2d Cir 2008).

⁹⁵ See, for example, Hathaway, 117 Yale L J 1236 (cited in note 2).

having a less transparent and populist process for concluding agreements with other nations (as the constitutional Founders believed), from a democratic theory perspective treaties are probably a less attractive vehicle than statutes *for making domestic law*.⁹⁶ This is presumably part of the reason that it has long been assumed that, unlike statutes, treaties may not by themselves create criminal liability in the United States.⁹⁷

Defenders of self-execution equivalency for statutes and treaties often point to the “last-in-time doctrine,” which holds that, when there is a conflict between a federal statute and a self-executing treaty, U.S. courts will apply the later in time of the two enactments.⁹⁸ This doctrine, however, makes no claim about the extent to which treaties and statutes should be judicially enforceable, but rather simply holds that when both are enforceable the later in time is controlling. In any event, despite the doctrine, it appears that courts have been quite reluctant to allow treaties to displace statutes. There is only one Supreme Court decision that has clearly allowed a treaty to supersede a statute, *Cook v United States*, and in that case the Executive Branch pushed for this outcome and thus sought to overturn the actions of its own Coast Guard.⁹⁹ Moreover, as Professor Tim Wu has noted, “because non-self-execution or other doctrines of deference can be, and are, used to prevent a later-in-time treaty from abrogating an earlier statute, the last-in-time rule is not a full or accurate portrayal of judicial practice.”¹⁰⁰

The reluctance of U.S. courts to allow treaties to supersede federal statutes can be traced back to the decision that is said to be

⁹⁶ In many instances it is likely to turn out that the concurrence of two-thirds of the Senate will represent a majority of the country's population, but this will not necessarily be the case. If large states are in dissent, two-thirds of the Senate can represent substantially less than a majority of the population, given that small and large states have equal representation in the Senate. See Yoo, *Treaties and Public Lawmaking*, 99 Colum L Rev at 2240 n 79 (cited in note 11). Senators also of course have much longer terms than members of the House, which (by design) may make them less responsive to democratic majorities.

⁹⁷ See, for example, *Hopson v Krebs*, 622 F2d 1375, 1380 (9th Cir 1980); *United States v Postal*, 589 F2d 862, 877 (5th Cir 1979); *The Over the Top*, 5 F2d 838, 845 (D Conn 1925).

⁹⁸ See, for example, *Whitney v Robertson*, 124 US 190, 194 (1888); *Cook v United States*, 282 US 102, 118–19 (1933). There is debate among commentators over whether the last-in-time rule is consistent with Founding understandings, with some commentators claiming that treaties should always trump statutes, other commentators claiming that statutes should always trump treaties, and still other commentators defending the status quo.

⁹⁹ See 288 US 102 (1933); Wu, 93 Va L Rev at 597 (cited in note 26).

¹⁰⁰ Wu, 93 Va L Rev at 595–96 (cited in note 26).

the genesis of the self-execution doctrine, *Foster v Neilson*.¹⁰¹ *Foster* involved an 1819 treaty between the United States and Spain that ceded certain disputed territory east of the Mississippi River to the United States. The petitioners claimed title to a tract of land within the territory based on an 1804 grant from Spain, and on that basis sought to eject the respondent from the tract. The English-language version of the treaty provided in relevant part that all grants of land made by Spain in the ceded territory prior to the treaty “shall be ratified and confirmed to the persons in possession of the lands to the same extent that the same grants would be valid if the territories had remained under the dominion” of Spain. The Court famously concluded that this provision was in “the language of contract” and therefore “adresse[d] itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”¹⁰²

What many descriptions of this decision fail to note is that, before concluding the treaty with Spain, the U.S. government had taken the position that the area encompassing the tract at issue in the case had already been ceded by Spain to France in 1800, and that France had conveyed it to the United States in 1803 as part of the Louisiana Purchase. This view, moreover, was reflected in several federal statutes enacted prior to the treaty. It was against that backdrop that the Supreme Court concluded that “the legislature must execute the contract before it can become a rule for the Court” and that, in the meantime, the Court was “*not at liberty to disregard the existing laws on the subject*.”¹⁰³

Critics of *Foster* often point out that the Court changed its view about the enforceability of the treaty provision several years later in *United States v Percheman*, after examining the Spanish version of the treaty.¹⁰⁴ Critics contend that *Percheman* shows the weakness of the *Foster* precedent and provides support for a presumption in favor of self-execution.¹⁰⁵ Importantly, however, the land at issue in *Percheman* was indisputably within Spanish territory at the time of

¹⁰¹ See 27 US at 314–15. The concept of non-self-executing treaties predated *Foster*. Justice Iredell discussed the concept, for example, in his circuit court decision in the *Ware v Hylton* case in the 1790s. See 3 US 199, 272 (1796) (Iredell).

¹⁰² 27 US at 314–15.

¹⁰³ *Id* at 314–15 (emphasis added).

¹⁰⁴ 32 US (7 Pet) 51 (1833).

¹⁰⁵ See, for example, Vázquez, 122 Harv L Rev at 607–08, 644–45 (cited in note 7).

the 1819 treaty and thus, unlike in *Foster*, the grant in question did not pose a potential conflict with preexisting statutes.¹⁰⁶ This pair of decisions, therefore, can be seen as an early marker of judicial reluctance to allow treaties to displace Congress's legislative role (a reluctance also confirmed by Professor Wu's work).

The *Power Authority* decision, discussed in the last part, may be another example of this reluctance. In reversing the Federal Power Commission and declining to give effect to the purported reservation, the *Power Authority* decision is said to undermine the legitimacy of non-self-execution declarations sometimes attached by the Senate today to its advice and consent to treaties. As discussed above, to the extent that it does indict such declarations, its reasoning is unpersuasive, and it has had essentially no influence on subsequent practice. The decision can reasonably be read more narrowly, however, in light of the statutory backdrop in that case, which by its terms appeared to give the commission licensing authority over the newly acquired water. In that light, the decision can be seen as reflecting the reluctance of a court to allow a treaty provision (or treaty reservation) to override a federal statutory scheme, which was in fact the thrust of an important academic brief submitted on behalf of the petitioner in that case.¹⁰⁷ Indeed, as Professor Henkin noted in commenting on the *Power Authority* decision, "it seems doubtful . . . that anyone would have challenged the power of the Senate and President to append a provision that development of the waters of the Niagara was to await congressional action, had there been no applicable legislation."¹⁰⁸

Assuming this reluctance to allow treaties to displace Congress's legislative role is justified, it suggests a greater potential scope for non-self-execution today than might have been true in the past. In the modern era, both statutes and treaties have proliferated, and the content and structure of treaty-making has changed such that treaties are often the vehicle for broad-based legislative efforts.

¹⁰⁶ See 32 US (7 Pet) at 88–89; see also *Garcia v Lee*, 37 US 511, 520 (1838) (noting this distinction between *Foster* and *Percheman* and stating that "the case of *Foster* and *Elam v. Neilson* must, in all other respects, be considered as affirmed by that of *The United States v. Percheman*"); Buergenthal, 235 *Recueil des Cours* at 373 (cited in note 69) (also noting this distinction).

¹⁰⁷ See *Opinion of Philip C. Jessup & Oliver J. Lissitzyn for the Power Authority of the State of New York* (Dec 1955) (on file with author); see also Bradley and Goldsmith, 149 *U Pa L Rev* at 453 (cited in note 22) (discussing this point).

¹⁰⁸ Henkin, 56 *Colum L Rev* at 1172 (cited in note 78).

These developments mean, among other things, that statutes and treaties are much more likely to overlap with one another and to express potentially different policy choices. Even when treaties reflect policies similar to those in existing U.S. statutes, treaties (as noted above) tend to use different language than is used in the statutes and thus, if enforced directly, may require significant litigation to work out the implications of this language. (As discussed in Part I, this is one reason the Senate routinely includes non-self-execution declarations with its advice and consent to human rights treaties.)¹⁰⁹ One should expect, therefore, that in the modern era courts would become less willing to apply treaties directly as rules of decision, and this is precisely what appears to have happened. As discussed earlier, the lower courts in the post-World War II period have come close to presuming against self-execution, at least for multilateral treaties and other treaties not covered by prior lines of precedent.¹¹⁰

The rise of congressional-executive agreements also may reduce the need for and desirability of direct judicial application of treaties.¹¹¹ As the overlap between treaty-making and legislating has increased, so has the number of congressional-executive agreements, such that now they constitute the vast majority of inter-

¹⁰⁹ See text accompanying note 23.

¹¹⁰ See text accompanying note 15; see also Restatement (Third) of the Foreign Relations Law of the United States, § 111, reporters' note 5 (cited in note 14) ("Treaties on subjects that Congress has regulated extensively are more likely to be interpreted as non-self-executing.").

¹¹¹ Professor Vázquez attempts to invoke the phenomenon of congressional-executive agreements as support for treaty self-execution, arguing that if an international agreement is not likely to be self-executing, the President would have no reason to use the Article II process instead of the congressional-executive agreement process, and thus the choice of the Article II process must suggest a desire for self-execution. See Vázquez, 122 Harv L Rev at 691–92 (cited in note 7). This argument is questionable on a number of levels. As a legal matter, it is far from clear that congressional-executive agreements benefit from the *Missouri v Holland* rule that allows Article II treaties (and legislation implementing them) to regulate matters beyond the scope of Congress's authority. See, for example, Hathaway, 117 Yale L J at 1339 (cited in note 2) (concluding that *Missouri v Holland* does not apply to congressional-executive agreements). If not, that would constitute an independent legal reason for the President to use the Article II treaty process in some instances, regardless of whether the treaty will be self-executing. In addition, there might be all sorts of nonlegal reasons why the President would continue to use the Article II process for certain agreements that have nothing to do with self-execution, such as the avoidance of likely political resistance from the Senate. This appears to be the case, for example, in the arms control area, see Curtis A. Bradley and Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 554–55, 558 (3d ed 2009) (documenting successful Senate insistence on use of Article II process for arms control treaties), and yet it is unlikely that arms control treaties are generally self-executing.

national agreements concluded by the United States. As supporters of this development emphasize, these agreements have the virtue of including the full Congress in considering whether to approve a treaty, and in deciding how the treaty should be accommodated within the framework of existing U.S. law. The shift to these agreements also reduces the issue of self-execution, since Congress often specifies the level of judicial enforceability that it wants when approving the agreements (sometimes substantially limiting such enforceability).¹¹² Furthermore, it is easier to analogize these congressional-executive agreements to statutes for purposes of judicial enforceability because they actually are statutes.

V. MEDELLÍN AND ITS AMBIGUITIES

The Supreme Court's decision last Term in *Medellín v Texas*, despite some ambiguities, is generally consistent with the three claims defended above.¹¹³ Under the Vienna Convention on Consular Relations, a treaty that the United States ratified in 1969, when foreign nationals are arrested in the United States, the arresting authorities are obligated to inform the foreign nationals that they have the right to have their consulate notified of the arrest and to communicate with the consulate.¹¹⁴ Under a separate Optional Protocol to the Vienna Convention that it also ratified in 1969, the United States further agreed to have disputes arising under the Vienna Convention heard by the International Court of Justice (ICJ).

In a 2004 decision, *Case Concerning Avena and Other Mexican Nationals*, the ICJ concluded that the United States had violated the consular notice rights of fifty-one Mexican nationals on death row in various states, and that it was obligated to provide these nationals with "review and reconsideration" of their convictions and sentences in light of the violations, notwithstanding any procedural defaults that might otherwise bar such review and reconsideration.¹¹⁵ Under a provision in another treaty—Article 94 of the United Nations Charter—a member of the United Nations (such

¹¹² See Hathaway, 117 Yale L J at 1321 (cited in note 2); Wu, 93 Va L Rev at 648 (cited in note 26).

¹¹³ My analysis in this part draws upon an earlier article. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 Am J Int L 540 (2008).

¹¹⁴ See Vienna Convention on Consular Relations, Art 36.

¹¹⁵ 2004 ICJ Rep 12 (March 31), reprinted in 43 ILM 581 (2004).

as the United States) “undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”¹¹⁶

After the ICJ’s decision in *Avena*, the U.S. government took the position that the ICJ had erred in concluding that the Vienna Convention overrode domestic rules of procedural default, and the Supreme Court agreed with the government in a 2006 decision, *Sanchez-Llamas v Oregon*, that did not involve any of the fifty-one Mexican nationals covered by the *Avena* decision.¹¹⁷ The government also took the position that, although an ICJ decision to which the United States is a party is binding on the United States as a matter of international law, it does not “provide a free-standing source of law on which a private party may rely in domestic judicial proceedings.”¹¹⁸ Despite taking these positions, President Bush issued a memorandum to his attorney general in February 2005 stating that the United States would comply with the *Avena* decision by having its state courts give effect to the decision “in accordance with general principles of comity” in the fifty-one cases covered by the decision, and the government took the position that this memorandum was binding on state courts. Shortly thereafter, the United States withdrew from the Optional Protocol, which had been the basis for the ICJ’s jurisdiction in *Avena*.

Jose Ernesto Medellín, one of the fifty-one Mexican nationals covered by the *Avena* decision, was convicted of murder and sentenced to death in Texas in 1994. He first raised a Vienna Convention claim in state postconviction proceedings, and the state courts held that the claim was procedurally defaulted because it had not been raised on direct review. Medellín subsequently sought federal habeas corpus relief, which was denied. After President Bush issued the memorandum concerning compliance with *Avena*, Medellín once again initiated state postconviction proceedings. The Texas Court of Criminal Appeals denied relief, concluding that neither the *Avena* decision nor the President’s memorandum operated to displace Texas’s law of procedural default.

¹¹⁶ United Nations Charter, Art 94(1).

¹¹⁷ See *Sanchez-Llamas v Oregon*, 548 US 331 (2006).

¹¹⁸ Brief for the United States as Amicus Curiae, *Ex parte Jose Ernesto Medellín*, at 14 (Tex Ct Crim App Sept 2, 2005), at <http://www.debevoise.com/publications/pdf/CCA%20US%20Amicus.PDF>.

In *Medellín v Texas*, the Supreme Court affirmed.¹¹⁹ The Court, in an opinion by Chief Justice Roberts, first held that the U.S. obligation to comply with the ICJ's decision in *Avena* was not self-executing and thus did not override Texas's law of procedural default. The Court examined Article 94 and the other treaty provisions to determine whether they "convey[ed] an intention" of self-execution,¹²⁰ and concluded that they did not. Endorsing the U.S. government's argument on this point, the Court explained that the phrase "undertakes to comply" in Article 94 does not constitute "a directive to domestic courts" but rather constitutes a commitment to take future political branch action.¹²¹ The Court noted that Article 94 "does not provide that the United States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts."¹²² Rather, the Court understood the language of Article 94 as "confirm[ing] that further action to give effect to an ICJ judgment was contemplated."¹²³ In a concurrence, Justice Stevens similarly reasoned that the phrase "undertakes to comply," especially when read in context, is best construed as "contemplat[ing] future action by the political branches."¹²⁴

In addition to relying on the "undertakes to comply" language, the Court noted that the remainder of Article 94 expressly set forth an enforcement mechanism for noncompliance with ICJ decisions—reference of the matter to the UN Security Council for possible sanctions. The Court reasoned that "[t]he U.N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts."¹²⁵ The Court also cited evidence suggesting that, when it submitted the UN Charter to the Senate, the Executive Branch envisioned that the Security Council would be the only

¹¹⁹ See 128 S Ct 1346 (2008).

¹²⁰ Id at 1356 (quoting *Igartua-De La Rosa v United States*, 417 F3d 145, 150 (1st Cir 2005) (en banc)).

¹²¹ Id at 1358.

¹²² Id.

¹²³ Id at 1359 n 5.

¹²⁴ Id at 1373 (Stevens, J, concurring).

¹²⁵ Id at 1359.

avenue for enforcement of ICJ decisions.¹²⁶ More generally, the Court accorded deference to the Executive Branch's views about the treaties, noting that the Executive Branch had "unfailing[ly] adhered to its view that the relevant treaties do not create domestically enforceable federal law."¹²⁷ The Court further emphasized particular features of the ICJ adjudicatory system, including the fact that the ICJ can only hear disputes involving nations, not individuals.¹²⁸

Finally, the Court observed that the consequences of giving direct effect to ICJ judgments "give pause."¹²⁹ The Court expressed particular concern that, under such a regime, even erroneous ICJ decisions could override state law, and potentially even federal law.¹³⁰ The Court also worried that the ICJ would have the ability to bind U.S. courts to extreme remedies, such as "annul[ing] criminal convictions and sentences, for any reason deemed sufficient by the ICJ."¹³¹ For these reasons, the Court suggested that it was unlikely that the U.S. political branches had intended for the obligation to comply with ICJ judgments to be self-executing.

In reaching its conclusion, the Court rejected what it called the "multifactor, judgment by judgment" approach to self-execution suggested by Justice Breyer in dissent, whereby courts would consider not only treaty text and drafting history, but also the treaty's subject matter, whether the treaty provision confers specific individual rights, and whether direct enforcement of the treaty would require the courts to create a new cause of action.¹³² The Court reasoned that such an approach would be too indeterminate and would give the courts too much discretion, thereby "assign[ing] to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced."¹³³ The Court particularly objected that, under the dissent's proposed approach, a treaty provision could be self-executing in some cases and non-self-executing in others. The Court thought it "hard to believe that the United States would enter into treaties that are sometimes

¹²⁶ *Id.* at 1359–60.

¹²⁷ *Id.* at 1361.

¹²⁸ *Id.* at 1360.

¹²⁹ *Id.* at 1364.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *id.* at 1362–63; *id.* at 1382–83 (Breyer, J., dissenting).

¹³³ *Id.* at 1363.

enforceable and sometimes not,”¹³⁴ and it expressed concern that allowing courts to make such case-by-case judgments would give the judiciary “the power not only to interpret but also to create the law.”¹³⁵

In addition to its finding of non-self-execution, the Court held that the President’s memorandum did not have the effect of overriding Texas’s law of procedural default. The Court reasoned that the conversion of a non-self-executing treaty obligation into self-executing federal law is an act of lawmaking that falls to Congress, not the President.¹³⁶ The Court further reasoned that, “[w]hen the President asserts the power to ‘enforce’ a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate,” and therefore his action falls into the lowest category of presidential power under Justice Jackson’s framework from the *Youngstown* steel seizure case.¹³⁷

As discussed below, the Court’s decision in *Medellin* is generally consistent with the three claims defended above: that the inclusion of treaties in the Supremacy Clause does not by itself tell us the extent to which treaties are judicially enforceable; that the relevant intent in discerning self-execution is that of the U.S. treaty-makers; and that there are important differences between statutes and treaties that are relevant to their judicial enforceability.

A. SUPREME LAW OF THE LAND

Consider first the relationship between Supremacy Clause and judicial enforceability. The Court obviously saw no contradiction between that Clause and the concept of non-self-execution. It cited *Foster* with approval and did not treat it as some deviation from the Constitution that had to be grudgingly accommodated because of stare decisis.

Nor did the Court view the Supremacy Clause as mandating a

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ See id at 1368–69.

¹³⁷ Id at 1369; see also *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 637 (1952) (Jackson, J, concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”).

presumption in favor of self-execution. The Court did not mention any such presumption, and, in concluding that the treaties in question were non-self-executing, it did not require clear evidence of an intent to preclude domestic judicial enforcement. Instead, it carefully examined the text, structure, and ratification history of the treaties to discern whether they were self-executing. The Court also emphasized that “Congress is up to the task of implementing non-self-executing treaties,”¹³⁸ further suggesting that it did not have in mind a presumption in favor of self-execution.

Professor Vázquez argues that *Medellín* is consistent with a general presumption in favor of self-execution, but his claim depends upon an unlikely reading of the Court’s reasoning. Professor Vázquez suggests that the Supreme Court interpreted Article 94 of the UN Charter as leaving parties to the Charter, including the United States, “some discretion not to comply” with ICJ decisions.¹³⁹ Instead of interpreting Article 94 as imposing a “hard” obligation on the United States to comply with *Avena*, he contends that the Court interpreted it as merely imposing a “soft” obligation to try to comply, or to use its best efforts to comply.¹⁴⁰ As a result, Professor Vázquez argues that the Court’s non-self-execution analysis should be limited to treaty provisions that, *as a matter of international law*, convey nonjusticiable political discretion.

No party made this argument about Article 94, and, as far as I know, there is no support for it in international law (and Professor Vázquez himself notes that such an interpretation of Article 94 would almost certainly be wrong).¹⁴¹ Instead, what the U.S. government had argued was that Article 94 constitutes “a commitment on the part of U.N. Members to take *future* action through their political branches to comply with an ICJ decision.”¹⁴² The Court quoted this language from the government’s brief, and then immediately stated, “We agree with this construction of Article

¹³⁸ 128 S Ct at 1366.

¹³⁹ Vázquez, 122 Harv L Rev at 660 (cited in note 7).

¹⁴⁰ See id at 662.

¹⁴¹ The ICJ has since confirmed that the *Avena* decision is unconditionally binding on the United States as a matter of international law. The ICJ noted that both the U.S. government and the U.S. Supreme Court accepted that proposition. See Judgment, *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, ¶¶ 28, 36, 44 (Jan 19, 2009), at <http://www.icj-cij.org/docket/files/139/14939.pdf>; PHPSESSID=d3b5b436b441b101118fb70dbc03dfaf.

¹⁴² 128 S Ct at 1358.

94.”¹⁴³ Neither the Court nor the parties suggested that Article 94 gave the United States some discretion not to comply with *Avena*. Indeed, the Court observed that, “No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States.”¹⁴⁴ Instead of resisting or qualifying that proposition, the Court distinguished international obligations from the issue of self-execution, noting that “not all international law obligations automatically constitute binding federal law enforceable in United States courts.”¹⁴⁵

In support of his contrary reading of the decision, Professor Vázquez cites an observation by the Court that giving ICJ decisions immediate domestic effect would eliminate the “option of noncompliance” contemplated by the UN Charter’s placement of enforcement authority with the Security Council. There is no suggestion in this observation, however, that the Court meant that the United States had the option *under international law* of not complying with an ICJ decision to which it was a party. Rather, the Court almost certainly meant that, given its veto power in the Council, the United States would as a practical matter have the ability to decide not to comply, and that the political branches were aware of that “option” when ratifying the relevant treaties. Indeed, the Court specifically noted that “the President and Senate were undoubtedly aware in subscribing to the U.N. Charter and Optional Protocol, [that] the United States retained the unqualified right to exercise its veto of any Security Council resolution.”¹⁴⁶ The Court further made clear that the “noncompliance” it was referring to was “through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate during and after consideration of the [relevant treaties].”¹⁴⁷ By contrast, said the Court, direct enforcement of ICJ decisions by U.S. courts would “undermin[e] the ability of the political branches to determine whether and how to comply with an ICJ

¹⁴³ Id.

¹⁴⁴ Id at 1356.

¹⁴⁵ Id.

¹⁴⁶ Id at 1359.

¹⁴⁷ Id at 1360.

judgment.”¹⁴⁸ In all these references, the Court is obviously referring to the *political* option of noncompliance, not one conferred as a matter of law by the treaty.

Professor Vázquez contends that there is no way to explain the Court’s reliance on the phrase “undertakes to comply” in its self-execution analysis other than through his reading of the decision.¹⁴⁹ In fact, as noted above, the Court (and Justice Stevens in his concurrence) understood that phrase as suggesting a future obligation to comply through political branch action. The Court distinguished the phrase from more present-tense terms such as “shall” and “must,” and also noted that the phrase did not “indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with *immediate* legal effect in domestic courts.”¹⁵⁰ Regardless of whether this happens to be the best reading of the phrase, the Court’s approach is similar to that taken in *Foster* and in a number of lower court decisions.¹⁵¹ Indeed, Professor Vázquez has himself noted in other writings that “[l]ater courts have interpreted *Foster* as establishing that ‘words of futurity’ indicate that a treaty provision is not self-executing.”¹⁵² Professor Vázquez argues that an intent-of-the-parties approach to self-execution would not have shown that “undertakes to comply” was in fact language of futurity, but, as I explain below, the Court was probably not following the intent-of-the-parties approach.

Despite all of this, *Medellín* need not be read as going to the opposite end of the spectrum and requiring a presumption *against* self-execution. Justice Breyer’s dissent accused the majority of adopting a clear statement requirement for self-execution, based on the Court’s comment in the presidential power portion of its decision that, “[i]f the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented ‘in mak[ing]’ the treaty, by ensuring that it contains

¹⁴⁸ *Id.*

¹⁴⁹ Vázquez, 122 Harv L Rev at 661–62 (cited in note 7).

¹⁵⁰ 128 S Ct at 1358.

¹⁵¹ See, for example, *Robertson v General Electric Co.*, 32 F2d 495, 500 (4th Cir 1929) (citing “language of futurity” as evidence of non-self-execution); *Sei Fujii v California*, 242 P2d 617, 622 (Cal 1952) (finding UN Charter provisions to be non-self-executing because, among other things, they were “framed as a promise of future action by the member nations”).

¹⁵² Vázquez, 89 Am J Intl L at 703 n 40 (cited in note 6).

language plainly providing for domestic enforceability.”¹⁵³ But the Court denied the charge, emphasizing that no “talismanic words” are required for self-execution.¹⁵⁴ The Court also made clear that self-execution should be determined on a treaty-by-treaty basis, stating, for example, that “under our established precedent, some treaties are self-executing and some are not, depending on the treaty.”¹⁵⁵ In addition, the Court observed that prior decisions that have found treaties to be self-executing “stand only for the unremarkable proposition that some international agreements are self-executing and others are not,”¹⁵⁶ and it reserved judgment on whether the relevant provision of the Vienna Convention on Consular Relations is self-executing, even though that provision does not contain a clear statement of self-execution.¹⁵⁷

If the Court was suggesting any presumption in *Medellín*, it was probably just a presumption against giving direct effect to ICJ judgments. It was after all the enforceability of ICJ judgments, rather than the status of treaty obligations in general, that was the precise question before the Court. The Court recognized this, stating: “The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.”¹⁵⁸ The Court subsequently noted that, “[g]iven that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended.”¹⁵⁹ A presumption against giving direct effect to ICJ judgments can easily be defended, however, without resort to any general presumption against treaty self-execution. ICJ judgments concern disputes between nations that will often be politically sensitive. As a result, there are good reasons to think that the political branches would want flexibility in deciding how to im-

¹⁵³ See 128 S Ct at 1369; id at 1380 (Breyer, J, dissenting).

¹⁵⁴ Id at 1366.

¹⁵⁵ Id at 1365.

¹⁵⁶ Id at 1364.

¹⁵⁷ See id at 1357 n 4.

¹⁵⁸ Id at 1356; see also id at 1357 n 4 (“The question is whether the *Avena* judgment has binding effect in domestic courts under the Optional Protocol, ICJ Statute, and U.N. Charter.”).

¹⁵⁹ Id at 1363–64.

plement these judgments after they are issued. Direct judicial enforcement of these judgments might even raise constitutional concerns in some cases, relating, for example, to the Article III authority of the federal courts, or to the role of the states in the U.S. federal system.¹⁶⁰

The Court's decision in *Medellín* will probably mean, as the dissenters asserted, that ICJ judgments issued pursuant to other ICJ clauses in treaties will also be deemed to be non-self-executing in the United States.¹⁶¹ This issue will rarely arise, however, in view of the infrequency with which the ICJ issues judgments involving the United States. Moreover, few other nations (if any) give direct effect to ICJ judgments, so the United States will hardly be alone in failing to do so.¹⁶² Nor does *Medellín* entail a significant change in U.S. practice: U.S. courts have never given direct effect to an ICJ judgment, and, in fact, the U.S. Court of Appeals for the District of Columbia Circuit held twenty years ago that such judgments were not enforceable in U.S. courts at the behest of private parties.¹⁶³

The one possible deviation in *Medellín* from my treatment of the Supremacy Clause is the suggestion by the Court, in a variety of statements, that non-self-executing treaties do not have any status as domestic law.¹⁶⁴ My approach, by contrast, would distinguish between judicially enforceable treaty commitments and those that are not, while treating all of them as the supreme law of the land. Among other things, I believe my approach is easier to reconcile with the text of the Supremacy Clause, which states that "all" treaties ratified by the United States shall be the supreme

¹⁶⁰ See Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 Supreme Court Review 59; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 Stan L Rev 1557 (2003).

¹⁶¹ 128 S Ct at 1388 (Breyer, J, dissenting).

¹⁶² See *id.* at 1363 (observing that "neither *Medellín* nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts"); see also A. Mark Weisburd, *International Courts and American Courts*, 21 Mich J Intl L 877, 886–87 (2000) (finding little support in other countries for giving ICJ decisions binding force in domestic courts).

¹⁶³ See *Committee of U.S. Citizens Living in Nicaragua v Reagan*, 859 F2d 929, 937–38 (DC Cir 1988).

¹⁶⁴ See, for example, 128 S Ct at 1356 ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.").

law of the land (and here Professor Vázquez and I are in agreement).¹⁶⁵

There is in any event some ambiguity in the opinion about whether the Court really meant to say that non-self-executing treaties were not part of the supreme law of the land. The Court never actually phrases it that way, and, in an opinion otherwise highly focused on textual materials, it never seeks to explain how its statements about non-self-executing treaties accord with the text of the Supremacy Clause.¹⁶⁶ In addition, in a number of places in the opinion the Court appears to equate the self-execution issue with judicial enforceability.¹⁶⁷ The Court's general test for self-execution also focuses on whether the treaty is a "directive to domestic courts,"¹⁶⁸ not on whether the treaty is domestic law. Moreover, a number of the Court's references to lack of domestic law status were focused on the *Avena* judgment rather than on the underlying treaties.¹⁶⁹ Even the Texas Solicitor General, who successfully argued the case for Texas, has made clear that he views non-self-executing treaties as part of the supreme law of the land, despite the fact that his brief used phrasing similar to that used by the Supreme Court.¹⁷⁰

The Court's position on this issue continued to be ambiguous

¹⁶⁵ See also Henkin, *Foreign Affairs and the United States Constitution* at 203–04 (cited in note 8) ("Whether [a treaty] is self-executing or not, it is supreme law of the land.").

¹⁶⁶ For an effort to reconcile the proposition that non-self-executing treaties lack the status of domestic law with the Supremacy Clause, see the postings by Nick Rosenkranz in the *Federalist Society Online Debate* (cited in note 27).

¹⁶⁷ See, for example, 128 S Ct at 1356 ("[N]ot all international law obligations automatically constitute binding federal law enforceable in United States courts.") (emphasis added); id ("The question we confront here is whether the *Avena* judgment has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts.") (second emphasis added); id at 1361 ("The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts . . .") (emphasis added).

¹⁶⁸ Id at 1358.

¹⁶⁹ See, for example, id at 1357 ("[W]e conclude that the *Avena* judgment is not automatically binding domestic law."); id at 1372 ("For the reasons we have stated, the *Avena* judgment is not domestic law."). These statements are much easier to reconcile with the text of the Supremacy Clause, since, unlike treaties, ICJ judgments are not listed in the Supremacy Clause as part of the supreme law of the land.

¹⁷⁰ See Ted Cruz, Remarks, *Federalist Society Online Debate* (cited in note 27) ("Of course, all three treaties at issue (including Article 94 of the UN Charter) are 'federal law,' because all treaties are 'federal law.' That wasn't the question before the Court. The question was whether the treaties were 'self-executing,' by which the Court meant judicially enforceable in U.S. courts."). Cf. Brief for Respondent, *Medellín v Texas* at 14 (No 06-984) ("[U]nless the treaty reflects an agreement between the President and the Senate to create domestic law, no such law is made.").

in a subsequent order by the Court denying Medellín a stay of execution. In declining to issue the stay, the Court stated that “[i]t is up to Congress whether to implement obligations undertaken under a treaty which (like this one) does not itself have the force and effect of domestic law *sufficient to set aside the judgment or the ensuing sentence*.”¹⁷¹ The italicized language would appear to be superfluous if the Court believes that non-self-executing treaties lack any domestic law status. For what it is worth, the Senate Foreign Relations Committee has expressed the view after *Medellín* that non-self-executing treaties are part of the supreme law of the land.¹⁷²

While not particularly material to the analysis in this article, the issue of whether non-self-executing treaties have some domestic law status might matter in some contexts. It might matter, for example, in debates within the Executive Branch over whether the President is obligated to comply with a non-self-executing treaty.¹⁷³ It might also affect the Executive Branch’s ability to take action voluntarily to enforce a non-self-executing treaty.¹⁷⁴ In *Medellín*, the Court reasoned that “the non-self-executing character of a treaty constrains the President’s ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts.”¹⁷⁵ At the same time, the Court disavowed any suggestion that a non-self-executing treaty, without implementing legislation, “preclude[d] the President from acting to comply with an international treaty obligation,” and indicated that “[t]he President may comply with the treaty’s obligations by some other

¹⁷¹ *Medellín v Texas*, 129 S Ct 360, 361 (2008) (emphasis added).

¹⁷² See, for example, Exec Rept 110–12, 110th Cong, 2d Sess, *Extradition Treaties with the European Union* (Sept 11, 2008) at 10 (“In accordance with the Constitution, all treaties—whether self-executing or not—are the supreme law of the land, and the President shall take care that they be faithfully executed.”), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:er012.110.pdf.

¹⁷³ Cf. Derek Jinks and David Sloss, *Is the President Bound by the Geneva Conventions?* 90 Cornell L Rev 97, 158 (2004) (arguing that “the President’s duty under the Take Care Clause includes a duty to execute treaties that are the law of the land”). The Take Care Clause of the Constitution provides that the President is obligated to take care that the “Laws” are faithfully executed. The government did not rely on that Clause as a source of authority in *Medellín*, and the Court briefly dismissed the Clause’s relevance at the end of its opinion, on the ground that the Clause “allows the President to execute the laws, not make them,” and that “the *Avena* judgment is not domestic law.” 128 S Ct at 1372. The Court did not say there that non-self-executing treaties do not constitute “Laws” for purposes of the Take Care Clause.

¹⁷⁴ See generally Edward T. Swaine, *Taking Care of Treaties*, 108 Colum L Rev 331 (2008).

¹⁷⁵ 128 S Ct at 1371.

means, so long as they are consistent with the Constitution.”¹⁷⁶ The distinction between lack of judicial enforceability and lack of domestic law status also mattered to Justice Stevens’s concurrence: because Justice Stevens regarded the treaty obligation in question to be part of the supreme law of the land, even though not self-executing, he suggested (somewhat cryptically, to be sure) that the states had an obligation to comply with it, even though they would not be forced to do so by the federal courts.¹⁷⁷

B. RELEVANT INTENT

The *Medellín* decision is also generally consistent with my second claim, which is that the relevant intent for self-execution is that of the U.S. treaty-makers. The Court stated that “[o]ur cases simply require courts to decide whether a treaty’s terms reflect a determination by *the President who negotiated it and the Senate that confirmed it* that the treaty has domestic effect.”¹⁷⁸ The Court also noted that “we have held treaties to be self-executing when the textual provisions indicate that *the President and Senate* intended for the agreement to have domestic effect.”¹⁷⁹ And, in summarizing its finding of non-self-execution, the Court explained that “[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the *President or Senate* intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by ‘many of our most fundamental constitutional protections.’”¹⁸⁰ The Court’s rejection of the dissent’s proposed multifactor approach to self-execution was also premised on an intent-of-the-U.S. approach. The Court stated: “The dissent’s contrary approach would assign to the courts—not *the political branches*—the primary role in deciding when and how international agreements will be enforced.”¹⁸¹

There are, to be fair, a few indications in the opinion going the

¹⁷⁶ *Id.*

¹⁷⁷ See *id.* at 1374 (Stevens, J. concurring).

¹⁷⁸ 128 S. Ct. at 1366 (emphasis added).

¹⁷⁹ *Id.* at 1364 (emphasis added).

¹⁸⁰ *Id.* at 1367 (emphasis added) (quoting *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2687 (2006)).

¹⁸¹ *Id.* at 1363 (emphasis added); see also *id.* at 1360 (observing that “there is no reason to believe that the President and Senate signed up” for giving direct effect to ICJ decisions).

other way, which may suggest some confusion on the Court about the issue. The Court began its self-execution analysis by referring to Supreme Court decisions that have looked to the intent of the parties in interpreting substantive treaty terms.¹⁸² It also asserted that its finding of non-self-execution was confirmed by the post-ratification understandings of the treaty parties, something that would not be particularly relevant under an intent-of-the-U.S. approach.¹⁸³ The Court even considered in a footnote whether the ICJ had views on the self-execution issue, while (properly) expressing some doubt about whether such views would be relevant.¹⁸⁴

On balance, though, the Court's decision is best interpreted as endorsing an intent-of-the-U.S. approach. In addition to the many direct statements to this effect quoted above, the Court relied on the U.S. ratification history for the UN Charter rather than on the collective negotiating history. More generally, the Court did not attempt to ascertain how the relevant treaty language, such as "undertakes to comply," would be understood by other treaty parties. Furthermore, in the presidential power portion of its decision, the Court expressed the view that if the Executive Branch could make a non-self-executing treaty binding on domestic courts, it would be acting "in conflict with the implicit understanding of the ratifying Senate."¹⁸⁵ That assertion may or may not be persuasive with respect to the treaties at issue in *Medellín*, but the key point is that the Court focused here and elsewhere on the Senate's and the President's intent.

Professor Vázquez claims that, despite the overwhelming number of references in the opinion to senatorial and presidential intent, the Court could not have been considering that intent because it paid close attention to the treaty text. Such text, Professor Vázquez asserts, "reflects the intent of the parties, not the unilateral views of the U.S. treaty makers."¹⁸⁶ Professor Vázquez fails to recognize that, as discussed in Part III, the text could be relevant to *both* inquiries. Treaty text is of course relevant in ascertaining the collective intent of the parties, but it is also relevant

¹⁸² See *id.* at 1357–58.

¹⁸³ See *id.* at 1363.

¹⁸⁴ See *id.* at 1361 n. 9.

¹⁸⁵ *Id.* at 1369.

¹⁸⁶ Vázquez, 122 Harv L. Rev. at 659 (cited in note 7).

in ascertaining the unilateral intent of the U.S. treaty-makers, which is the only intent there is likely to be with respect to the issue of self-execution. Thus, as the Court explained, “we have held treaties to be self-executing when the textual provisions *indicate that the President and Senate intended* for the agreement to have domestic effect.”¹⁸⁷ The Court also specifically defended its emphasis on treaty text by noting: “That is after all what the *Senate* looks to in deciding whether to approve the treaty.”¹⁸⁸ Like Professor Vázquez, Justice Breyer’s dissent in *Medellín* misses this point. Justice Breyer contends that looking at the treaty text for evidence concerning self-execution is, at best, “hunting the snark,” because it is unlikely that the parties will have reached an agreement on the issue that would be incorporated into the text.¹⁸⁹ In fact, only an intent-of-the parties approach to self-execution would end up constituting a snark hunt.

To be sure, absent a specific declaration by the Senate, it is not clear that text by itself will provide *sufficient* evidence of the U.S. treaty-makers’ intent concerning whether a particular treaty provision is self-executing. If the text does not, it may be unrealistic to think that the Court can avoid the indeterminacy and judicial discretion associated with the dissent’s proposed approach. Despite its criticism of the dissent, however, the Court was probably not insisting that text is the only relevant consideration in discerning such intent. Indeed, as noted above, the Court looked to statements made in the ratification history to aid its understanding of this intent.¹⁹⁰ The subject matter of the treaties in question—international dispute resolution between nations—also appears to have been relevant to the Court’s assessment of likely intent.¹⁹¹ The Court even invoked functional considerations to support its analysis.¹⁹² In rejecting the multifactor approach proposed in dissent by Justice Breyer, the Court appears principally to have been objecting to the idea that a treaty provision could be self-executing in some cases but not in others. A contextual approach could be

¹⁸⁷ 128 S Ct at 1364 (emphasis added).

¹⁸⁸ Id at 1362 (emphasis added).

¹⁸⁹ Id at 1381 (Breyer, J, dissenting). See also Vázquez, 122 Harv L Rev at 629, 636–37 (cited in note 7) (endorsing Justice Breyer’s “snark” comment).

¹⁹⁰ See text accompanying note 126.

¹⁹¹ See text accompanying note 128.

¹⁹² See text accompanying note 129.

applied, however, in a more categorical way, such that a treaty provision would be either self-executing or not in all cases, avoiding the Court's concern.¹⁹³

It is true, as Professor Vázquez points out,¹⁹⁴ that the presidential power portion of the Court's decision reflects a formalistic conception of lawmaking. The Court reasoned there that "the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."¹⁹⁵ One might infer from that discussion, as Professor Vázquez does, that the Court would resist the idea that the U.S. treaty-makers have an adjunct or lesser-included lawmaking power over self-execution. But this inference is far from clear, since the exercise of such a power still requires the use of the treaty process, that is, two-thirds Senate consent and presidential approval. The Court's concern in *Medellín*, by contrast, was with unilateral presidential control over the issue, especially when that control contradicted a decision made earlier by the U.S. treaty-makers. The Court noted, for example, that "[w]hen the President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate."¹⁹⁶ Moreover, the Court's presidential power analysis actually appears to assume that the U.S. treaty-makers have exercised some domestic lawmaking power when deciding that a treaty shall not be self-executing, since this was the basis on which the Court concluded that President Bush was operating within the lowest category of Justice Jackson's *Youngstown* framework.¹⁹⁷

¹⁹³ Cf. *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 542 US 155, 168–69 (2004) (rejecting case-by-case approach to determining whether comity factors supported the application of U.S. antitrust law to independent foreign injury in favor of categorical approach).

¹⁹⁴ See Vázquez, 122 Harv L Rev at 659 (cited in note 7).

¹⁹⁵ 128 S Ct at 1369.

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* at 1369 ("[T]he non-self-executing character of the relevant treaties not only refutes the notion that the ratifying parties vested the President with the authority to unilaterally make treaty obligations binding on domestic courts, but also implicitly prohibits him from doing so."). I am merely describing the Court's reasoning here, not endorsing it. The fact that the U.S. treaty-makers did not intend for ICJ decisions to be directly enforceable in U.S. courts would not necessarily mean that they wanted to preclude the President from implementing such decisions if he or she chose to do so. More generally,

C. STATUTES AND TREATIES

Consistent with my third claim, the Court also took account of the distinct nature of treaties in its self-execution analysis. Quoting the *Head Money Cases*, the Court noted at the outset that a treaty is “‘primarily a compact between independent nations’ that ordinarily ‘depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.’”¹⁹⁸ While the Court of course recognized that some treaties are also domestically enforceable in U.S. courts, this is only true, said the Court, “when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”¹⁹⁹

In finding that there was no such self-executing intent, the Court took account of the treaty context. Among other things, the Court observed that the requirement of compliance with ICJ decisions was situated within an international legal system that emphasized political rather than judicial enforcement—in particular, enforcement through the Security Council, where the United States holds a veto. The Court also expressed concern about transferring “sensitive foreign policy decisions” to the state and federal courts, given that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political”—Departments.”²⁰⁰

In addition, the Court also observed in a footnote that even when treaties are self-executing, “the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”²⁰¹ For this proposition, the Court quoted from the Restatement (Third) of Foreign Relations, which appears to be making an empirical claim about the nature of treaties. Professor Vázquez dismisses the Restatement’s observation on the ground that “the Supremacy Clause generally makes treaties enforceable in our courts in the same circumstances as statutory and

the Court may have passed over too quickly the possibility that treaties, like some statutes, could delegate enforcement authority to the Executive Branch.

¹⁹⁸ Id at 1357.

¹⁹⁹ Id at 1364.

²⁰⁰ Id at 1360 (quoting *Oetjen v Central Leather Co.*, 246 US 297, 302 (1918)).

²⁰¹ Id at 1357 n 3 (quoting Restatement (Third) of the Foreign Relations Law of the United States, § 907, cmt. a (cited in note 14)).

constitutional provisions of like content,”²⁰² but, for reasons already discussed, that is an overly broad reading of the Clause.

The Court’s institutional process concerns associated with giving direct effect to ICJ judgments were also related specifically to the international context of the case. As noted above, the Court stated that the consequences of the argument that ICJ decisions have direct effect in the U.S. legal system “give pause,” because the argument would mean that an ICJ judgment “is not only binding domestic law but is also unassailable” such that even erroneous ICJ rulings would override state and possibly even federal law. While it is common for domestic courts to exercise this sort of authority, the Court was obviously troubled by the idea that such authority had been delegated to actors outside of the U.S. legal system. In this respect, the decision was foreshadowed by the Court’s earlier decision in *Sanchez-Llamas*, in which the Court resisted the idea that U.S. federal courts should be bound by the ICJ’s interpretation of a treaty.²⁰³ These concerns, which relate to democratic process and sovereignty, are not typically implicated by domestic statutes.

Finally, the Court’s discussion of the “option of noncompliance” demonstrated its recognition of the dual law-and-politics nature of treaty commitments. The Court was not advocating the breach of U.S. treaty obligations, but it was recognizing that decisions about whether and how to comply with such obligations are not purely legal decisions but also involve questions of international politics. As discussed above, the duality of treaties suggests that the role of the courts in enforcing them may be somewhat more limited than with respect to statutes, especially when such enforcement poses a risk of undermining political branch management of foreign relations, a proposition evident at least since *Foster*. The long-standing doctrine of deference to Executive Branch treaty constructions, invoked by the Court in *Medellín*, also takes account of this proposition.

²⁰² Vázquez, 122 Harv L Rev at 627 n 131 (cited in note 7).

²⁰³ See *Sanchez-Llamas v Oregon*, 126 S Ct 2669, 2684 (2006) (“If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”) (quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803)). The Court in *Medellín* made clear, however, that it was “not suggest[ing] that treaties can never afford binding domestic effect to international tribunal judgments.” 128 S Ct at 1364–65.

VI. CONCLUSION

The Supreme Court's decision in *Medellín* is unlikely to result in a significant change in the extent of U.S. judicial enforcement of treaties, but it may make it less likely that certain academic ambitions about such enforcement will be achieved. As the Court appears to have recognized, treaties have a dual nature in that they are situated in the domain of international politics as well as in the domain of law, and this duality is relevant to their judicial enforceability. Their dual nature means that their domestic judicial enforceability is in part a political decision, not some automatic rule of the Supremacy Clause. The relevant intent in discerning whether treaties are subject to such domestic judicial enforceability is in turn the intent of the national political branches. Finally, the international political dimension of treaties means that, as a class, they are less likely than statutes to be subject to domestic judicial enforcement, especially in the modern era.

Although judicial practice may not change substantially after *Medellín*, we are likely to see increased use by the Senate of declarations of self-execution and non-self-execution. Assuming such declarations are valid, as this article has maintained, the Senate practice should simplify the issue of self-execution over time. The widespread and continuing use of congressional-executive agreements may have a similar effect. In other situations it may be appropriate to give deference to the current views of the Executive Branch about the treaty's domestic enforceability. There will of course continue to be circumstances in which there will be no clear guidance from the political branches, and in those cases courts are likely to make contextual judgments that take account of the text, structure, and subject matter of the treaty, lines of precedent and other historical practice, the congressional backdrop, and the functional consequences of direct judicial enforceability. The doctrine of treaty self-execution thus entails a degree of judicial discretion, but it is a type of discretion that is ultimately subject to political branch control.